(22,694)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 303.

J. C. HOGAN, PLAINTIFF IN ERROR,

vs.

C. M. KEYS AND HUGH MILLS, PARTNERS UNDER THE NAME OF C. M. KEYS & CO., AND STOCK YARDS BANK, A CORPORATION, AND WAT MAYES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 22, 1912.

1 In the Supreme Court of the State of Oklahoma.

No. 1950.

J. C. HOGAN, Plaintiff in Error,
vs.
C. M. KEYS and HUGH MILLS, Partners under the Name of C. M. Keys & Co., and Stock Yards Bank, a Corporation, and Wat Mayes, Defendants in Error.

Return to Writ of Error.

In obedience to the within Writ of Error I herewith transmit to the Supreme Court of the United States, a full, true and complete transcript of the record and all proceedings concerning the same, in the above entitled cause, except the case made, a copy of which is incorporated in the appeal in case No. 1947, First National Bank of Claremore, Plaintiff in error, vs. C. M. Keys and Hugh Mills, a partnership under the firm name of C. M. Keys & Company, and Stock Yards Bank, a corporation, and Wat Mayes, Defendants in error, and herein referred to, and is omitted from the transcript in this case at the request of attorneys for plaintiff in error.

In witness whereof, I hereto set my hand and affix the seal of said court, at Oklahoma City, this 10th day of March, 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

2 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to C. M. Keys, Hugh Mills, a Partnership under the Name of C. M. Keys & Company, and Stock Yards Bank, a Corporation, and Wat Mayes, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C. within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein J. C. Hogan is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Oklahoma, this 13th day of February, 1911.

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma.

By JESSIE PARDOE, *Deputy.*

Service of this citation is hereby accepted this Feb'y 21, 1911.

ROBERT F. BLAIR,
Attorney for C. M. Keys & Co., Stock Yards Bank.

I, the undersigned, Wat Mayes, do hereby acknowledge service of the within and foregoing citation upon me in Mayes County, Oklahoma, this the 20th day of February, 1911.

WAT MAYES.

Witnesses:
H. A. KUHN.
HARVE LANGLEY.

3 [Endorsed:] No. 1950. J. C. Hogan, Plaintiff in Error, vs. C. M. Keyes et al., Defendants in Error. Citation. Filed Feb. 27, 1911. W. H. L. Campbell, Clerk.

4 In the Supreme Court of the State of Oklahoma.

No. 1950.

J. C. HOGAN, Plaintiff in Error,
vs.
C. M. KEYS and HUGH MILLS, Partners of the Name of C. M. Keys & Company, and Stock Yards Bank, a Corporation, and Wat Mayes, Defendants in Error.

Application for Allowance of Writ of Error and the Fixing of Amount of Supersedeas Bond.

J. C. Hogan, represents that on the tenth day of January, 1911, the Supreme Court of the State of Oklahoma, which is the highest Court in the State of Oklahoma, in which a decision of this suit can be had, entered a final judgment and filed an opinion, dismissing the proceedings in error in this cause from the judgment of the District Court of Craig County, Oklahoma, adjudging that the plaintiff in error was not entitled to any of the funds derived from the sale of the cattle attached in the cause, and the ground for dismissal was that "the decision of this Court when this case was before

it on a former appeal determines every question of law which is now presented by counsel for plaintiff in error, and therefore there is nothing for this court to determine, and the petition in error ought to be dismissed."

5 That this suit was commenced in the United States Court in and for the Indian Territory, Northern District thereof, on the 20th day of July, 1905, and the proceedings in said Court resulted in a judgment for the plaintiff in error against Wat Mayes, and in said suit there was an intervention by this plaintiff in error, seeking to recover the proceeds of certain cattle attached in said suit, and in said suit C. M. Keys, Hugh Mills, partners under the name of C. M. Keys & Company, and Stock Yards Bank, intervened and sought to apply to their debt the entire proceeds of the cattle attached, and the suit and intervention proceeds to judgment in the United States Court, Indian Territory, Northern District, to the effect that this plaintiff in error was entitled to have its claim against Wat Mayes to the amount of Six Thousand Eight Hundred One Dollars and Ninety Six Cents ($6,801.96), paid out of the proceeds of the sale of the cattle adjudged, and denying the application of C. M. Keys & Company and Stock Yards Bank to have the said fund set aside to satisfy their claim to the amount of $15,808.69.

That an appeal was taken from the said judgment to the United States Court of Appeals in the Indian Territory, by C. M. Keyes & Company and Stock Yards Bank, and said appeal was pending at the time of the admission of the State of Oklahoma into the Union, and the Supreme Court of said State assumed jurisdiction of the same, and said Supreme Court on the tenth day of September, 1908, filed an opinion reversing and modifying the said judgment, and on the ninth day of December, 1909, after an opinion on rehearing, affirmed its former opinion, and on the ninth day of December, 1909, caused to be issued a mandate to the District Court of Craig County, Oklahoma, commanding the said District Court of Craig County, Oklahoma, "to take such further proceedings herein as shall accord with said opinion of the Supreme Court and right and justice."

That in the proceedings had in the United States Court, in the Indian Territory, and in the Supreme Court of the State of

6 Oklahoma, and in the District Court of Craig County, Oklahoma, this plaintiff in error specially claimed a title, and a right under the Constitution, and the Statutes of the United States, and it claimed a right, a title, a privilge and an immunity under an authority exercised under the United States, and the decision of the Supreme Court of the State of Oklahoma, and the District Court of Craig County, Oklahoma, is against such title, right, privilege and immunity, so specially set up and claimed by this plaintiff in error, under said Constitution, Statutes and authority, and in said suit the validity of the Statutes of the United States, and the validity of the authority exercised under the United States, was drawn in question, and the decision of the Supreme Court of the State of Oklahoma, and of the District Court of Craig County, Oklahoma, was against their validity, and the plaintiff in error represents and

avers that in the said judgment of the Supreme Court of the State of Oklahoma, as well as in the judgment of the District Court of Craig County, Oklahoma, there was manifest errors to the prejudice of this plaintiff in error, and the plaintiff in error to the end that further and complete justice be done, prays for an order allowing it to prosecute a writ of error to the Honorable Supreme Court of the United States, under and in accordance with the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which he shall make and furnish upon said writ of error, by way of supersedeas and cost bond, and further states that there is herewith presented his assignment of errors, alleged to have been committed by said Court, and intended to be urged in the prosecution by it of said writ in error, and prays that the judgment of the Supreme Court of the State of Oklahoma, and of the District Court of Craig County, Oklahoma, be reversed.

J. C. HOGAN,
By J. H. LANGLEY,
Attorney.

7 Let a writ of Error issue in the above cause, and the Cost and Supersedeas Bond is fixed at $2000.00 and it is further ordered that the Mandate of the lower Court be withheld for twenty (20) days to enable the plaintiff in error to prepare and tender its Bond for approval.

This the 23rd day of January, 1911.

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Filed Jan. 23, 1911. W. H. L. Campbell, Clerk.

8 In the Supreme Court of the State of Oklahoma.

No. 1950.

J. C. HOGAN, Plaintiff in Error,
vs.
C. M. KEYS and HUGH MILLS, Partners of the Name of C. M. Keys & Company, and Stock Yards Bank, a Corporation, and Wat Mayes, Defendants in Error.

Assignment of Errors.

The plaintiff in error, J. C. Hogan, makes the following assignment of errors upon which he will rely upon his prosecution of the

writ of error to the Supreme Court of the United States, in the above entitled cause, from the judgment rendered by the Supreme Court of the State of Oklahoma, on the tenth day of January, 1911, affirming the judgment of the District Court of Craig County, Oklahoma, and the following assignment of errors alleged to have been committed by the District Court of Craig County, Oklahoma, and the following assignment of errors alleged to have been committed by the Supreme Court of the State of Oklahoma, upon the first appeal in this cause, and it says:

I.

That the Supreme Court of the State of Oklahoma erred in dismissing the petition in error prosecuted by him from the
9 judgment of the District Court of Craig County, Oklahoma.

II.

The Supreme Court of the State of Oklahoma erred in holding that all the questions presented by the second appeal were disposed of upon the first appeal.

III.

The District Court of Craig County, Oklahoma, erred in rendering judgment against the plaintiff in error, and the Supreme Court of the State of Oklahoma erred in dismissing the proceedings in error instituted by the plaintiff in error to the judgment of the District Court of Craig County, Oklahoma.

IV.

The District Court of Craig County, Oklahoma, erred in refusing to allow the plaintiff in error to amend his pleadings and the Supreme Court of the State of Oklahoma, erred in dismissing the proceedings in error to review the judgment.

V.

The District Court of Craig County, Oklahoma, erred in refusing to allow the plaintiff in error to file an amended answer to the interplea of the defendants in error, and the Supreme Court of the State of Oklahoma, erred in refusing to reverse the order of the District Court of Craig County, Oklahoma.

VI.

The District Court of Craig County, Oklahoma, erred in holding that the claims of the defendants in error to the cattle fund were superior to the claims of the plaintiff in error, and the Supreme Court of the State of Oklahoma, erred in refusing to disturb the action of the District Court of Craig County, Oklahoma.

VII.

The District Court of Craig County, Oklahoma, erred in undertaking to disturb the action of the United States Court, in the Indian Territory, Northern District, awarding to this plaintiff in error payment out of the cattle fund of the amount due it from the defendant, Wat Mayes, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court of Craig County, Oklahoma.

VIII.

The District Court of Craig County, Oklahoma, erred in rendering judgment it did upon the findings of fact that were made by the United States Court in the Indian Territory, Northern District, and the Supreme Court of the State of Oklahoma, erred in refusing to disturb the action of the District Court.

IX.

The District Court of Craig County, Oklahoma, erred in rendering judgment without making findings of fact, and the Supreme Court of the State of Oklahoma, erred in refusing to disturb the action of the District Court.

X.

The District Court of Craig County, Oklahoma, erred in not segregating the cattle fund from the lot fund, and in not making separate distribution of the respective funds, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XI.

The District Court of Craig County, Oklahoma, erred in not finding the amount that he should repay and to whom, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XII.

The District Court of Craig County, Oklahoma, erred in not finding specifically the amount of the costs that should be taxed to the various parties in the case, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XIII.

The District Court of Craig County, Oklahoma, erred in exhausting the cattle fund by ordering that it should be paid to C. M. Keys & Company and Stock Yards Bank, to the detriment of this plaintiff in error, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XIV.

The District Court of Craig County, Oklahoma, errred in rendering judgment without a trial, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XV.

The District Court of Craig County, Oklahoma, erred in holding that the mortgage relied upon by the defendants in error was duly of record under the laws of the United States, and under the laws of the United States was superior to the mortgage of the plaintiff in error, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XVI.

The District Court of Craig County, Oklahoma, erred in rendering judgment against the plaintiff in error.

XVII.

The Supreme Court of the State of Oklahoma erred in taking jurisdiction of the original appeal.

XVIII.

The Supreme Court of the State of Oklahoma erred in modifying the judgment of the United States Court of the Indian Territory, Northern District on the first appeal.

XIX.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the evidence did not warrant the finding that the mortgage relied upon by C. M. Keys & Company and
12 Stock Yards Bank had become fraudulent and void as against other lien claimants and attaching creditors.

XX.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was not necessary, after the division of the Northern District of the Indian Territory into the Northern District and the Western District, to have the C. M. Keys & Company and Stock Yards Bank mortgage placed of record at Vinita.

XXI.

The Supreme Court of the State of Oklahoma, erred on the first appeal in holding that it was not necessary for C. M. Keys & Company and Stock Yards Bank to have their mortgage indexed at Pryor Creek, after the making of the recording districts in the Indian Territory.

XXII.

The Supreme Court of the State of Oklahoma, erred on the first appeal in holding that it was not necessary for the mortgagee to take possession of the property, and was also not necessary for the mortgagee to have the mortgages put of record at Vinita and also at Pryor Creek.

XXIII.

The Supreme Court of the State of Oklahoma, erred on the first appeal in holding that it was admitted that the plaintiff in error had actual knowledge of the existence of the chattel mortgage to C. M. Keys & Company and Stock Yards Bank.

XXIV.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the rule of law with reference to real property records was the same as in case of personal property.

13 XXV.

The Supreme Court of the State of Oklahoma on the first appeal erred in holding that it was not necessary for the mortgagee, after the division of the districts, to pay the fees of indexing or recording the mortgages in the new districts, where the property was located and the mortgagors resided.

XXVI.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was the duty of the Clerk of the United States Court of Indian Territory to transfer to the indexes at other places the mortgages that had thereto-fore been recorded in his office, without request upon the mortgagees and without payment of the fees.

XXVII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that a mortgage once recorded was notice to all persons of the existence of such mortgage.

XXVIII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the filing of the mortgage hence-forth gave notice to everybody of its existence, notwithstanding the division of the Districts and the change of the places of recording.

XXIX.

The Supreme Court of the State of Oklahoma on the first appeal erred in holding that the Clerk of the United States Court had not urged as an excuse for his failure to record in other districts or to transfer to the indexes in other districts, the mortgage of C. M.

Keyes & Company, and Stock Yards Bank, his inability so to do, but had urged the want of an appropriation for it.

XXX.

14 The Supreme Court of the State of Oklahoma erred on the first appeal in holding that there was no question of actual fraud in the case, and that the Supreme Court of the State of Oklahoma erred in holding that it was not claimed that there was any fraud in the case.

XXXI.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that C. M. Keys & Company and Stock Yards Bank had done all that was necessary to keep their mortgages alive, as required by the laws of the United States relating to recording of mortgages.

XXXII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the claim of C. M. Keys & Company and Stock Yards Bank was superior to the claim of the plaintiffs in error.

XXXIII.

The Supreme Court of the State of Oklahoma erred on the first appeal in modifying the judgment.

XXXIV.

The Supreme Court of the State of Oklahoma erred on re-hearing of the first appeal in holding that the acknowledgment upon the C. M. Keys & Company and Stock Yards Bank mortgage was in accordance with the laws of the United States.

XXXV.

The Supreme Court of the State of Oklahoma erred on the first appeal on re-hearing in holding that there was no evidence to support the finding of the United States Court in Indian Territory, Northern District, to the effect that there was fraud in the method of handling the mortgaged property, such as to invalidate the C. M. Keys & Company and Stock Yards Bank mortgage.

XXXVI.

15 The Supreme Court of the State of Oklahoma erred in holding that the evidence did not show that any of the creditors of Wat Mayes were prejudiced in any way by the dealings of Wat Mayes with C. M. Keys & Company or their assignees, Stock Yards Bank.

XXXVII.

The Supreme Court of the State of Oklahoma erred in holding that the charge of fraud by the defendants in error was without foundation.

XXXVIII.

The Supreme Court of the State of Oklahoma erred in refusing to render a judgment, if they were going to reverse the case, providing for the distribution of the funds derived from the sale of the lots, and the funds derived from the sale of the cattle, and erred in refusing to give instructions to the Court below what to do upon this matter.

The plaintiff in error says that all things complained of in the assignment of error- took place over his objection and exception, and to his damage, and against his rights, as given by the laws of the United States.

Wherefore, the plaintiff in error prays that the judgment of the Supreme Court of the State of Oklahoma dismissing its proceedings in error to the District Court of Craig County, Oklahoma, be reversed; that the judgment of the District Court of Craig County, Oklahoma, be reversed; that the judgment of the Supreme Court of the State of Oklahoma upon the first appeal by C. M. Keys & Company and Stock Yards Bank from the judgment of the United States Court, of Indian Territory, Northern District, be reversed; and, that the judgment of the United States Court in the Indian Territory, Northern District, be, in all things affirmed, and that proper instructions be given to the lower Court for carrying out the judgment of this court.

J. C. HOGAN,
Plaintiff in Error,
By J. H. LANGLEY,
Attorney.

16 [Endorsed:] No. 1950. J. C. Hogan, Plaintiff in Error, vs. C. M. Keys and Hugh Mills, partners of the name of C. M. Keys & Co., and Stock Yards Bank, a Corp. and Wat Mayes, Defendants in Error. Application for Allowance of Writ of Error and the Fixing of Amount of Supersedeas Bond & Assignment of Erors. Filed Jan. 23, 1911. W. H. L. Campbell, Clerk. J. Howard Langley, Attorney for Plaintiff in Error.

17 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justice of the Supreme Court of the State of Oklahoma, Greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the Supreme Court of the State of Oklahoma before you, or some of you, being the highest

court of law or equity of the said State in which a decision could be had in said suit between J. C. Hogan, plaintiff in error, and C. M. Keys — Hugh Mills, a partnership under the name of C. M. Keys & Company, and Stock Yards Bank, a Corporation, and Wat Mayes, Defendants in error, wherein rights, privileges and immunities are claimed under the constitution and statutes of the United States, and under authority exercised under the United States, and the decision was against the rights, privileges and immunities specially set up or claimed under such Constitution, statutes and authority, a manifest error has happened, to the great damage of the said J. C. Hogan, as by his complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you *that* if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States together with this writ, so that you may have the same at Washington within thirty days from the date hereof in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 15th day of Feb-
18 ruary in the year of our Lord One Thousand Nine Hundred and Eleven.

[The Seal of the Circuit Court of the United States, Western District of Oklahoma.]

HARRY L. FINLEY,
Clerk of the Circuit Court of the United States for the Western District of Oklahoma.

Allowed by—

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

[Seal Supreme Court, State of Oklahoma.]

19 [Endorsed:] No. 1950. J. C. Hogan, Plaintiff in Error, vs. C. M. Keys, et al., Defendants in Error. Writ of Error. Filed Feb. 16, 1911. W. H. L. Campbell, Clerk.

20 In the Supreme Court of the State of Oklahoma.

No. 1950.

J. C. HOGAN, Plaintiff in Error,
vs.
C. M. KEYS, HUGH MILLS, a Partnership under the Name of C. M. Keys & Company, and Stock Yards Bank, a Corporation, and Wat Mayes, Defendants in Error.

Know all men by these presents: That we, J. C. Hogan, as principal, and J. D. Hinton, of Pryor, Oklahoma, and C. B. Markham, of Pryor, Oklahoma, as sureties, are held and firmly bound unto above named C. M. Keys, Hugh Mills, a partnership of the name of C. M. Keys & Company, and Stock Yards Bank, a Corporation, and Wat Mayes, in the sum of Two Thousand Dollars ($2000.00) to be paid to them and for the payment of which, well and truly to be made, we bind ourselves and each of us and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 8th day of February, in the year of our Lord One Thousand Nine Hundred Eleven.

Whereas, the above named J. C. Hogan, plaintiff in error, seeks to prosecute his writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute his writ of error to effect and answer all costs and damages that may be adjudged if *it* shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

21 J. C. HOGAN.
J. D. HINTON.
C. B. MARKHAM.

Approved, this the 13th day of February, 1911.

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

STATE OF OKLAHOMA,
County of Mayes, ss:

J. D. Hinton, one of the sureties in the foregoing bond, being duly sworn, says, that he is a resident and freeholder of the State of Oklahoma, and resides in Mayes County, and that he is worth, above all just debts and liabilities in property not by law exempt from execution, in the State of Oklahoma, the sum of $5000.00.

J. D. HINTON.

Subscribed and sworn to before me this the 8th day of February, 1911.

R. W. THOMAS,
Notary Public.

[SEAL.]

My Commission expires Oct. 3rd, 1912.

STATE OF OKLAHOMA,
Mayes County, ss:

C. B. Markham, one of the sureties in the foregoing bond, being duly sworn, says, that he is a resident and freeholder of the State of Oklahoma, and resides in Mayes County, and that he is worth, over and above all just debts and liabilities in property not by law exempt from execution, in the State of Oklahoma, the sum of $2000.00.

C. B. MARKHAM.

Subscribed and sworn to before me this the 8th day of February, 1911.

R. W. THOMAS,
Notary Public.

[SEAL.]

My Commission expires Oct. 3, 1912.

22 (Copy.) [Endorsed:] No. 1950. J. C. Hogan, Plaintiff in Error, vs. C. M. Keys et al., Defendants in Error. Appeal Bond. Filed Feb. 14, 1911. W. H. L. Campbell, Clerk.

23 In the Supreme Court of the State of Oklahoma.

No. 1950.

J. C. HOGAN, Plaintiff in Error,
vs.
C. M. KEYS and HUGH MILLS, Partners under the Name of C. M. Keys & Co., and Stock Yards Bank, a Corporation, and Wat Mayes, Defendants in Error.

Petition in Error of J. C. Hogan.

The plaintiff in error represents and shows to the court, that in a certain suit wherein First National Bank of Claremore was plaintiff and Wat Mayes was defendant, brought in the United States Court in the Indian Territory, Northern District, at Vinita, on the 20th day of July, 1906, certain cattle were attached upon which the plaintiff in error had a mortgage; that in said suit this plaintiff in error intervened, and in said suit C. M. Keys and Hugh Mills, partners under the name of C. M. Keys & Co. and Stock Yards Bank, intervened, claiming the attached property under a mortgage; that various other parties intervened and the cause was placed upon the

equity docket and finally resulted in a judgment ordering the cattle sold and the proceeds distributed, and that there was sufficient of the proceeds to pay this plaintiff in error a part of his debt, to-wit; the sum of $——, and this plaintiff in error did receive a part of the same under said judgment. That an appeal was taken from the judgment in the cause to the United States Court of Appeals in the Indian Territory and on the admission of the State of Oklahoma into the Union, the Supreme Court of the State took jurisdiction of said appeal, and that thereafter said court rendered an opinion reversing the action of the United States Court in the Indian Territory, Northern District, and remanding the cause to the Dis-
24 trict Court of Craig County, Oklahoma. That after mandate came down this plaintiff in error, in accordance with said opinion, made application to the District Court of Craig County, Oklahoma, for leave to file an amended answer to the interplea of C. M. Keys & Co. and Stock Yards Bank, and did tender an answer therewith on the 2nd day of April, 1910, and on the same day, to-wit; the 2nd day of April, 1910, the court refused to allow him to file an amended answer or to allow this plaintiff in error to file any pleadings in the cause, and that thereafter on said day this plaintiff in error objected to the Court's making any orders disturbing the judgment of the United States Court, in the Indian Territory, Northern District, and said Court, over his objection and exception, proceeded so to do, and proceeded to order that the cattle fund be paid to C. M. Keys & Co. and to Stock Yards Bank, and by so doing did exhaust the entire cattle fund, on which this plaintiff in error held a lien; all of which things happened to the detriment of this plaintiff in error.

And this plaintiff in error prays that the action of the District Court of Craig County, Oklahoma, be in all things reversed, and that the action of the United States Court in the Indian Territory, Northern District, be in all things affirmed, and he makes the following assignment of errors:

I.

The District Court of Craig County, Oklahoma, erred in refusing to allow this plaintiff in error to file an amended answer to the interplea of the defendants in error.

II.

The District Court of Craig County, Oklahoma, erred in holding that the claims of the defendants in error to the cattle fund were superior to the claim of the plaintiff in error.

III.

The District Court of Craig County, Oklahoma, erred in
25 undertaking to disturb the action of the United States Court in the Indian Territory, Northern District, awarding to this plaintiff in error payment out of the cattle fund of the amount due him from the defendant, Wat Mayes.

IV.

The District Court of Craig County, Oklahoma, erred in rendering judgment upon the findings of fact that were made by the United States Court in the Indian Territory, Northern District, and which were allowed to stand.

V.

The District Court of Craig County, Oklahoma, erred in rendering judgment without making findings of fact.

VI.

The District Court of Craig County, Oklahoma, erred in not segregating the cattle fund from the lot fund and making separate distribution of the respective funds.

VII.

The District Court of Craig County, Oklahoma, erred in not finding the amount that should be repaid, and to whom, by this plaintiff in error.

VIII.

The District Court of Craig County, Oklahoma, erred in not finding specifically the amount of costs that were to be taxed to the various parties in the case.

IX.

The District Court of Craig County, Oklahoma, erred in exhausting the cattle fund by ordering that it should be paid to C. M. Keys & Co. and Stock Yards Bank, to the detriment of this plaintiff in error.

X.

The District Court of Craig County, Oklahoma, erred in refusing to allow this plaintiff in error a trial.

26 XI.

The District Court of Craig County, Oklahoma, erred in rendering judgment without a trial.

XII.

The District Court of Craig County, Oklahoma, erred in holding thar the mortgage relied upon by the defendant in error was duly of record under the laws of the United States, and was superior to the mortgage claimed under by the plaintiff in error.

There is hereto attached the original case-made, wherein appears the things and actions complained of.

J. C. HOGAN,
Plaintiff in Error,
By J. HOWARD LANGLEY,
His Attorney.

(Filed Aug. 26, 1910. W. H. L. Campbell, Clerk.)

27 In the Supreme Court of Oklahoma.

No. 1949.

CITIZENS BANK OF PRYOR CREEK, Plaintiff in Error,
vs.
C. M. KEYS et al., Defendants in Error,

and

No. 1950.

J. C. HOGAN, Plaintiff
vs.
C. M. KEYS et al., Defendants.

Motion by C. M. Keys & Company and Stock Yards Bank to Dismiss Petition in Error.

And now come defendants in error, C. M. Keys & Company and Stockyards Bank, and appearing herein specially for the purpose of this motion only, and respectfully show to the court:

(1) That plaintiffs in error have failed to have summons in error served upon these defendants in error as required by law.

(2) That plaintiffs in error have failed to give bond as conditioned by law.

(3) That plaintiffs in error have failed to comply with Rule number 7 of this court, and prepare and serve upon counsel for opposite parties their brief.

(4) That the petition in error is filed herein for the purpose of delay only, and is therefore fraud upon the jurisdiction of this court.

(5) That the decree entered in this cause by the District Court of Craig County conforms in every particular to the mandate of this court.

(6) That the decision of this court, when this case was
28 before it on appeal, judicially determines every question which is now presented by the petition in error filed herein; and the District Court of Craig County, Oklahoma, entered a decree in this case in accordance with said decision of this court, and therefore all the questions which are now raised upon this appeal have been judicially determined by said decision of this court as appears from the report of said decision in the case of C. M. Keys & Company, et al., vs. First National Bank of Claremore, et al., 104 Pac., 346-353.

Wherefore, these defendants in error move the court to dismiss the petition in error filed herein.

And in duty bound these defendants in error will ever pray.

____ ____,
Attorney for Defendants in Error.

[Endorsed:] #1949. Copy. Filed Nov. 10, 1910. W. H. L. Campbell, Clerk.

29 And thereafter, to-wit: on the 10th day of November 1910, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, September Term, 1910, November 10th, 1910, Twenty-third Judicial Day.

#1950.

J. C. HOGAN, Plaintiff in Error,
vs.
C. M. KEYS et al., Defendants in Error.

And now on this day it is ordered by the court that the motion of defendants in error herein for leave to argue motion to dismiss orally, be, and the same is hereby denied.

30 And thereafter, to-wit: on the 10th day of January 1911, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, January Term, 1911, January 10th, 1911, First Judicial Day.

#1950.

J. C. HOGAN, Plaintiff in Error,
vs.
C. M. KEYS et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and motion to dismiss filed herein.

And the court having duly considered the same and being fully advised in the premises, finds: That the petition in error should be dismissed.

It is therefore ordered and adjudged by the court, that the petition in error herein, be, and the same is hereby dismissed.

Opinion Per Curiam.

(Filed 10th Day of January, 1911.)

31 In the Supreme Court of the State of Oklahoma.

No. 1947.

FIRST NATIONAL BANK OF CLAREMORE, Plaintiff in Error,
vs.
C. M. KEYS & COMPANY et al., Defendants in Error.

No. 1948.

FIRST NATIONAL BANK OF VINITA, Plaintiff in Error,
vs.
C. M. KEYS & COMPANY et al., Defendants in Error.

No. 1949.

CITIZENS BANK OF PRYOR, Plaintiff in Error,
vs.
C. M. KEYS & COMPANY et al., Defendants in Error.

No. 1950.

J. C. HOGAN, Plaintiff in Error,
vs.
C. M. KEYS & COMPANY et al., Defendants in Error.

(Filed January 10, 1911.)

If, upon a cause being remanded with directions to enter judgment in accordance with the opinion of the supreme court, the court below enters judgment in substantial conformity with the directions of the appellate court, its action will not be disturbed on a second proceeding in error.

(Syllabus by the Court.)

Error from the District Court of Craig County.

Before T. L. Brown, Trial Judge.

Dismissed.

W. H. Kornegay and J. Howard Langley, Attorneys for Plaintiffs in Error.

W. P. Thompson, Attorney for Intervenor, Vinita National Bank.

Robert F. Blair, Attorney for the Defendants in Error, C. M. Keys & Co.

32 PER CURIAM:

The above entitled cases were before this court in a former proceeding in error and the opinion wherein the facts are fully stated is reported in 22 Okla. 174. After the mandate went down the First National Bank of Claremore and the First National Bank of Vinita sought to amend their pleadings and retry the issues involved as though the cases had been reversed and remanded for a new trial. The Court refused to allow any amendments, and entered judgment in accordance with what it understood the mandate of the supreme court directed. To reverse this action of the court below this proceeding in error was commenced.

The question now before use arises upon a motion to dismiss the petition in error upon the ground, among others, that, "The decision of this court when this case was before it on a former appeal, determines every question of law which is now presented by counsel for plaintiff in error, and therefore there is nothing for this court to determine and the petition in error ought to be dismissed." This motion must be sustained. An examination of the record discloses that after the case was remanded, the court below entered judgment in substantial conformity with the mandate of the supreme court. It has been held by this court that if upon a cause being remanded for a new trial, the court below has proceeded in substantial conformity to the directions of the appellate court, its actions will not be questioned on a second appeal. O. C. Elec. Gas. & Power Co., et al., v. Baumhoff, 21 Okla. 503; C. R. I. & P. Ry. Co. v. Broe, 23 Okla. 396; State Bank of Waterloo, Ill. v. City Nat. Bank of Kansas City, Mo., 110 Pac. 910. The petition in error is dismissed.

33 And thereafter, to-wit: on the 24th day of January, 1911, in the Supreme Court of Oklahoma, the following proceedings were had, to-wit:

Supreme Court, January Term, 1911, January 24th, 1911, Fourth Judicial Day.

#1950.

J. C. HOGAN, Plaintiff in Error,
vs.
C. M. KEYS et al., Defendants in Error.

And now on this day it is ordered by the court that the mandate of this court in the above entitled cause, be, and the same is hereby stayed.

34 In the Supreme Court of the State of Oklahoma.

No. 1950.

J. C. HOGAN, Plaintiff in Error,

vs.

C. M. KEYS and HUGH MILLS, a Partnership under the Firm Name of C. M. Keys & Company, and Stock Yards Bank, a Corporation, and Wat Mayes, Defendants in Error.

Certificate.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the within and foregoing 33 pages, numbered from 1 to 33, both inclusive, are a full, true and complete transcript of the record and all proceedings in the above entitled cause, except the case made, a copy of which is incorporated in the appeal in case No. 1947, First National Bank of Claremore, Plaintiff in error, vs. C. M. Keys and Hugh Mills, a partnership under the firm name of C. M. Keys & Company, and Stock Yards Bank, a corporation, and Wat Mayes, Defendants in error, and is omitted from the transcript in this case at the request of attorney for plaintiff in error.

In witness whereof, I hereto set my hand and affix the seal of said court, at Oklahoma City, this 10th day of March, 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 22,694, Oklahoma Supreme Court. Term No. 303. J. C. Hogan, plaintiff in error, vs. C. M. Keys and Hugh Mills, partners under the firm name of C. M. Keys & Company; Stock Yards Bank, and Wat Mayes. Filed May 24th, 1911. File No. 22,694.

5

Office Supreme Court, U. S.
FILED.
MAR 15 1913
JAMES H. McKENNEY,

In the Supreme Court of the United States

October Term, 1912

First National Bank of Claremore,
Plaintiff in Error.
vs.
C. M. Keys and Hugh Mills, a partnership, under the name of C. M. KEYS & COMPANY, Stock Yards Bank and Wat Mayes, Defendants in Error. NO. 263

First National Bank of Vinita,
Plaintiff in Error.
vs.
C. M. Keys and Hugh Mills, a partnership, under the name of C. M. KEYS & COMPANY, Stock Yards Bank and Wat Mayes, Defendants in Error. NO. 264

Citizens Bank of Pryor Creek,
Plaintiff in Error.
vs.
C. M. Keys and Hugh Mills, a partnership, under the name of C. M. KEYS & COMPANY, Stock Yards Bank and Wat Mayes, Defendants in Error. NO. 302.

J. C. Hogan, Plaintiff in Error
vs.
C. M. Keys and Hugh Mills, a partnership, under the name of C. M. KEYS & COMPANY, Stock Yards Bank and Wat Mayes, Defendants in Error. NO. 303.

BRIEF of First National Bank of Claremore; of First National Bank of Vinita; of Citizens Bank of Pryor Creek, and of J. C. Hogan, the respective Plaintiffs in Error.

W. H. KORNEGAY,
J. HOWARD LANGLEY,
Attorneys for Plaintiffs in Error.

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LEADER PRINTING CO. VINITA, OKLAHOMA

In the
Supreme Court
of the
United States

October Term, 1912

First National Bank of Claremore,
Plaintiff in Error.

vs.

C. M. Keys, and Hugh Mills, a partnership, under the name of C. M. KEYS & COMPANY, Stock Yards Bank and Wat Mayes,
Defendants in Error.

No. 263.

First National Bank of Vinita,
Plaintiff in Error.

vs.

C. M. Keys, and Hugh Mills, a partnership, under the name of C. M. KEYS & COMPANY, Stock Yards Bank, and Wat Mayes,
Defendants in Error.

No. 264.

Citizens Bank of Pryor Creek,
Plaintiff in Error.

vs.

C. M. Keys, and Hugh Mills, a partnership, under the name of C. M. KEYS & COMPANY, Stock Yards Bank, and Wat Mayes,
Defendants in Error.

No. 302.

J. C. Hogan, - *Plaintiff in Error.*

vs.

C. M. Keys, and Hugh Mills, a partnership, under the name of C. M. KEYS & COMPANY, Stock Yards Bank, and Wat Mayes,
Defendants in Error.

No. 303.

IN THE SUPREME COURT OF THE UNITED STATE, OCTOBER TERM, 1912.

BRIEF of First National Bank of Claremore; of First National Bank of Vinita; of Citizens Bank of Pryor Creek, and of J. C. Hogan, the respective Plaintiffs in Error.

STATEMENT

This cause comes on Writ of Error from the Supreme Court of the State of Oklahoma, separate Writs of Error being sued out by the respective Plaintiffs in Error. It originated in the United States Court in the Indian Territory, Northern District, by the filing of a Complaint in said Court sitting at Vinita, by Plaintiff in Error, First National Bank of Claremore against Defendant in Error, Wat Mayes, and the sueing out and levy of an attachment. The Complaint omitting the verification can be found on page 28 of the record in Case No. 263, and it is as follows:

"IN THE UNITED STATES COURT IN THE INDIAN TERRITORY, NORTHERN DISTRICT AT VINITA.

First National Bank of Claremore,
a Corporation - - *Plaintiff.*

vs.

Wat Mayes, - - *Defendant.*

COMPLAINT

The plaintiff states that it is a corporation organized under the laws of the United States and doing business in Claremore, Indian Territory and is a national bank. That the defendant resides in the Northern District of the Indian Territory and Vinita is the most convenient place to try the action. That the defendant herein is indebted to the plaintiff herein on a promissory note as follows:

"$4206.02. Claremore, Ind. Ter., Jan. 8, 1903.

One year *days* after date, for value received, I promise to pay to the order of FIRST NATIONAL BANK CLAREMORE, I. T., the sum of Forty Two Hundred Six and 62-100 Dollars, with interest there-

on at the rate of eight per cent per annum from maturity until paid.

The makers and endorsers of this note severally waive protest and notice of non-payment thereof, and if this note is collected by law we agree to pay ten per cent of the principal as attorney fees; we also agree not to schedule any of our property to avoid the payment of this note.

(Signed) Wat Mayes."

That said note after its making was extended to the 8th day of July, 1904, and thereafter was extended to January 8, 1905, and that on the 13th day of July, 1904, to cover the interest on said note for the year ending January 8, 1905, the defendant made to the plaintiff another note, which is as follows:

"$365.75 Claremore, Ind. —— July 13, 1904.

January 8, 1905, —— days after date, for value received, I promise to pay to the order of the FIRST NATIONAL BANK OF CLAREMORE, at Claremore, I. T., the sum of Three Hundred Fifty Six and 75-100 Dollars, with interest thereon at the rate of eight per cent per annum from maturity until paid.

The makers and endorsers of this note severally waive protest and notice of non-payment hereof, and if this note is collected by law, we agree to pay ten per cent of the principal as attorney fees; we also agree not to schedule any of our property to avoid the payment of this note.

(Signed). Wat Mayes."

That on the first mentioned note there would now be due the principal sum of $4206.62, and also the interest thereon at eight per cent per year from the 8th day of January, 1905, making the total amount $4386.09, and on the second note there would now be due the principal sum $356.75, and interest thereon from the 8th day of January, 1905, at eight per cent per year, making the total amount on the same $371.98. That in addition to these amounts the defendants is indebted to the plaintiff, in the sum of $43.55

for money paid for him on the 26th day of November, 1904, together with six per cent interest from the time of said account, amounting at the present time to $45.26. Also in addition to these amounts the defendant is indebted to the plaintiff in the sum of $66.12 for money paid for him on the 5th day of June, 1905, together with six per cent interest thereon from the time of said account, amounting at the present time to $66.56.

That all of said sums are past due and the defendant neglects to pay the same.

Wherefore, the premises considered, the plaintiff prays for judgment against the defendant for the sum of $4,386.09 on the first note, and the sum of $371.98 on the second note, and the sum of $111.82 on the accounts, making the total amount $4,869.89, and for costs.

FIRST NATIONA BANK OF CLAREMORE,
By W. H. Kornegay, its Attorney."

The attachment affidavit, omitting caption and verification, can be found on page 30 and is as follows:

"I, J. O. Hall, on oath do say: That I am president of plaintiff, First National Bank of Claremore, a corporation and that on its behalf I make this affidavit; that the plaintiff's claim herein is a demand on promissory notes and an account for money loaned and paid to the defendant, Wat Mayes; that the claim is just; that I believe the plaintiff ought to recover $4,869.89, and that the defendant herein has removed a material part of his property out of this Territory, not leaving enough therein to satisfy the claim of the plaintiff or the claim of defendant's creditors, and that he is about to remove a material part of his property out of the Territory, without leaving enough therein to satisfy the claim of the plaintiff or the claim of the defendant's creditors.

J. O. HALL."

The Marshal's Return on the attachment can be found on page 31 and is as follows:

"MARSHAL'S RETURN

Received this Order of Attachment with summons this 20th day of July, at 4 o'clock P. M., and served the same by levying upon the following described property of the within named defendant, to-wit:

262 cows, branded W. on left shoulder, value $.....
45 black cows, branded K on left side, - $.....
102 4 year old steers, branded W on left shoulder value - - - - - - $.....
98 2 year old steers, branded W on left shoulder, value - - - - - - $.....
35 1 year old steers, branded W on left shoulder, value - - - - - - $.....
39 1 year old heifers branded W on left shoulder, value - - - - - - $.....
7 bulls, branded W on left shoulder, value $.....
60 calves branded W on left shoulder, value $.....

All of said property was found in pastures about three miles S. E. of Pryor Creek, I. T., in Northern District of Ind. Ter., all of which said property I now hold subject to the orders of the Court.

I also served the same by copy as follows: Personally on Wat Mayes, at Pryor Creek, Ind. Ter., this 22nd day of July, 1905, at 8 o'clock A. M.

W. H. DARROUGH,
U. S. Marshal.
By J. D. Wilkins, Deputy."

On August 15, 1905, an order to sell the property as being perishable was asked for, page 33. On the same day Defendants in Error, C. M. Keys, and Stock Yards Bank, filed their inter-plea, which can be found on pages 33, 34 and 35, and the exhibit thereto which can be found on pages 27 to 40, and are as follows:

"THE UNITED STATES COURT, NORTHERN JUDICIAL DISTRICT, INDIAN TERRITORY, AT VINITA.

Honorable Joseph A. Gill, Presiding.

No. 2327 Law.

First National Bank of Claremore,
Plaintiff.

v.

Wat Mayes, - - *Defendant.*

INTERPLEA.

And now come the Stock Yards Bank and C. M. Keys &Company and by permission of the Court file this their petition and interplea herein, and respectfully show to the Court.

FIRST, That said bank is organized and existing under and by virtue of the laws of the State of Illinois having its domicile in the City of National Stock Yards, St. Clair County, Illinois, and having for its President, C. G. Knox, and for its cashier S. Chesney. that said C. M. Keys & Company was on the dates hereinafter mentioned a co-partnership, composed of C. M. Keys and Hugh Mills, doing business as brokers and commission merchants in the City of National Stock Yards, Illinois, and having *there* domicile therein.

SECOND, Said interveners further show to the court that plaintiff has sued out a writ of attachment against defendant's property, claiming among other things, that defendant has removed a material part of his property out of this Territory, not leaving enough therein to satisfy the claim of plaintiff or the claim of defendant's creditors and that he is about to remove a material part of his property out of said Territory, without leaving enough therein to satisfy the claim of plaintiff, or the claims of defendant's creditors; that plaintiff has caused said writ of attachment to be levied upon the property described in Intervener's Exhibit "B," which property is now in the custody of the United States Marshal for this District.

THIRD, these interveners further show to the

Court, that on to-wit, the 29th day of October, A. D., 1901, defendant said Wat Mayes being indebted to intervenersfi said C. M. Keys & Company, made executed and delivered to said interveners his one certain promissory note, of date of October 28th, 1901, for the sum of Thirty four thousand eight hundred Dollars and Four Cents, ($34,800.00) due and payable to the order of C. M. Keys & Co., at National Stock Yards. Illinois, six months after date, with interest thereon at the rate of eight per cent per annum from date thereof, a copy of which note, together with all endorsements thereon is hereto attached, marked "Interveners' Exhibit "A," and made a part of this intervention, to secure which, defendant then and there made, executed and delivered to said internever a chattel mortgage upon two thousand eight hundred thirty five (2,835) head of mixe deattle, and their increase, then and there situated about three (3) miles southeast of Pryor Creek, Indian Territory, the original of which mortgage, together with the certificate of Record of the Clerk and ex-officio Recorder and all endorsements thereon, is hereto attached, marked "Intervener's Exhibit "B," and made a part of this intervention, by reason of which defendant, Mayes did then and there grant, bargain, sell and convey unto said intervener the legal title in and to the cattle therein described, and did then and there give and acknowledge a mortgage lien upon said cattle for the security of said indebtedness; and, thereafter and on to-wit, the 31st day of October, A. D., 1901, at two (2) o'clock in the afternoon, said intervener duly filed and had said mortgage duly recorded in Book M, at page Two Hundred Eighty Six (286) in the office of the Clerk of the United States Court for the Northern District of the Indian Territory, at Muskogee, who was then and there ex-officio recorder for the Northern District of the Indian Territory as it then existed, by reason of which said intervener then and there claimed, acquired and fixed a lien upon said property described in said mortgage, which lien has since and is now a valid and subsisting lien upon said property.

FOURTH, that thereafter and before said note became due, said intervener, said C. M. Keys & Company for a valuable consideration and in a due course of business negotiated, sold and transferred said note to intervener, said Stock Yards Bank, and then and there made the following endorsement upon the back of said note:

"Presentment, demand, protect and notice of protest waived, and payment at maturity guaranteed.
C. M. KEYS & CO."

And then and there delivered said note to said intervener, said Stock Yards Bank; and at the same time said intervener, said C. M. Keys & Company, verbally assigned and transferred to said intervener said Stock Yards Bank, all their right, title and interest in and to said mortgage, by reason of which said interpleader, said Stock Yards Bank, became the legal owner and holder of said note and mortgage and said Bank is now the legal holder and owner of said note and mortgage and the superior title and right of possession in and to the cattle therein described; that when said note became due defendant was unable to pay the same but made a settlement with said interveners, paying part of said indebtedness and giving his note for the remainder thereof, and that from time to time thereindebtednes, until on to-wit 123456 7890$ 12345 7899 after, the defendant made various payments upon said indebtedness, until on to-wit, the first day of March, A. D., 1905, and as evidence of the remaining indebtedness then due from said defendant to said interveners on said indebtedness secured by the mortgage aforesaid, defendant made, executd, and dliverd to intervener, C. M. Keys & Company, his one certain promissory note for the sum of Twelve Thousand Twenty-six Dollars and Seventy four Cents ($12,026.74(, due and payable to the order of C. M. KEYS & CO., six months after date at National Stock Yards, Illinois, together with interest thereon at the rate of seven per cent per annum from date thereof; and also one certain promissory note, of date January 16th

1905, for the sum of Two Thousand Nine Hundred Seventy Dollars and Ninety-five Cents ($2,970.95) payable to the order of C. M. Keys & Co., at National Stock Yards, Illinois, together with interest thereon at the rate of seven per cent per annum from date thereof, by reason of which said defendant then and there promised and agreed to pay said interveners said sums of money according to the terms and tenor of said notes, copies of which notes are attached hereto, marked Interveners' Exhibit "C," and "Interveners' Exhibit "D" respectively, and made a part of this intervention; that thereafter and before said notes became due, for a valuable consideration and in a due course of business said intervener said C. M. Keys & Company, endorsed, negotiated, and sold to intervener said Stock Yards Bank, said notes, as shown by endorsements on said "Interveners' Exhibit "C," and "Interveners' Exhibit "D," and said interveners, said Stock Yards Bank, became the legal owner and holder thereof as aforesaid, and are now the legal owner and holder of said notes, together with the mortgage above described and set forth and all legal and equitable intreest thereon and rights thereunder; that there is now due and unpaid upon said indebtedness the sum of Fifteen Thousand Two Hundred Eight'-Eight Dollars and Sixty-Nine cents ($15,288.69) after allowing all just credits, payments and offsets to said defendant, said Wat Mayes; that on to-wit, the —— day of February, A. D., 1905, defendant Wat Mayes, made, executed and delivered to interpleader, said C. M. Keys & Company, his one certain promissory note—for the sum of Five Hundred and Twenty Dollars ($520.00), which together with interest thereon now aggregates the sum of Five Hundred and Twenty Dollars ($520.00.)

WHEREFORE, premises considered, said interpleaders pray the Court to transfer this case to the Equity Docket and refer the same to the Master in Chancery, in order that the evidence may be taken and report thereof made to this court, and that upon a final hearing hereof the court adjudge said mortgage lien

in favor of these interpleaders to be the first and paramount lien upon said property and that the same be foreclosed and sold in accordance with the law and the proceeds thereof be applied in satisfaction of said indebtedness; that these interpleaders have judgment against defendant, Wat Mayes, upon said notes for the sum of Fifteen Thousand Two Hundred Eighty-Eight Dollars and Sixty nine cents ($15,288.69) and for the further sum of Five Hundred Twenty Dollars ($520.00) together with all costs and general relief.

CAMPBELL and KEYS,
ROBERT F. BLAIR,
Attorneys for Interpleaders.

UNITED STATE OF AMERICA,
Western Judicial District,
Indian Territory:

Before me, the undersigned authority, on this day personally appeared C. M. Keys, who being by me duly sworn deposes and says that he is one of the interpleaders herein, and that he has read over the foregoing interplea and that the statements therein contained are true as he verily believes.

C. M. KEYS.

Subscribed and sworn to before me this fourteenth day of August, 1905.

(Seal) ROSE M. SIMPSON,
Notary Public.

My commission expires on the fifteenth day of March, A. D., 1908.

"INTERPLEADER'S EXHIBIT "B"

CHATTEL MORTGAGE.

KNOW ALL MEN BY THESE PRESENTS, that Wat Mayes of Pryor Creek, of the Cherokee Nation, Ind. Ter., party of the first part, in consideration of the sum of Thirty four thousand Eight Hundred and 04-100 Dollars to him paid by C. M. Keys & Co., party of the second part, the receipt whereof is hereby acknowledged, has bargained, sold, assigned and transferred, and by these presents does bargain, sell, assign and transfer unto said party of the second part and its

successors and asigns, all the following articles of personal property, situated in the Cherokee Nation, of Ind. Ter., to-wit:

Twenty Eight Hundred Thirty-five (2835) head of mixed cattle — years old and upward, average weight abot —nuloq|7890$..... 123456 7890$..... 7890$ 78907890 about — pounds and worth — $— now. For further and better description said cattle are marked and branded with one or more of the marks and brands as follows, viz:

Six hundred (600) three year steers; six hundred (600) cows four to eight years; one hundred forty three (143) four year steers; three hundred twenty (325) two year steers; one hundred (100) two year heifers; three hundred fifty (350) yearling steers and heifers; five hundred (500) last spring calves; twenty (20) bulls; Five (5) bulls coming two year old (the 20 bulls are coming 4 year old). Above mentioned cattle are branded thus W on left shoulder with the exception of a few of the cows and three years steers which have M on right shoulder, and about twelve of the last spring calves have K on both sides. Eleven (11) four year steers branded O on left loan; thirty-five (35) two year steers; thirty-eight (38) three year steers; fourteen (14) two year heifers; ten (10) four year bulls; eighty-four (84) cows; three to eight years all branded K on both sides; one hundred forty ton of cotton seed; three hundred fifty ton of hay; one thousand buls. of corn; six hundred acres of shocked fodder, and three hundred acres of shocked fodder rented. These cattle are located on said mortgagor's range, three miles southeast of Pryor Creek, I. T. And being all the property of the above description owned and controlled by the mortgagor now on said premises, and this mortgage is intended to cover and include all of said property of the above description and *and* addition and increase thereto located on the above described premises, and range, if any thereabouts. The marks and brands used above to describe said property are the holding marks and brands and carry the title, although said property may have other marks

and brands. If the mortgagor should desire to mix any other property with the above, before doing so he shall give a full description of said property intended to be so mixed, with the name of the owner thereof to said second party and obtain the written consent of said second party before mixing the same.

This mortgage shall also cover and include all the right, title and interest of the mortgagor, in and to the pasturage, feed, pens, feed troughs and water privileges used in feeding said live stock. Said property to remain and be kept on the premises above described until the full payment of the indebtedness hereinafter described, unless sooner marketed or removed by and with the written consent of the mortgagee or its assigns. When marketed said cattle are to be shipped and consigned for sale to C. M. Keys & Co., at the Stock Yards at Nat. Stock Yds. Ill., and when sold the proceeds thereof shall be applied first in payment of the usual and customary commissions to said C. M. Keys & Co., for selling the same, and the balance, or so much thereof as may be necessary, shall be applied on the indebtedness hereinafter described. If said cattle or any part thereof be consigned or sold elsewhere than above, then said mortgagee shall be paid a commission of 50 cents per head on all the above described cattle.

Provided always, and these presents are upon this express condition, that if said party of the first part shall pay or cause to be paid unto the said party of the second part, its successors, or assigns, the commissions heretofore stated and agreed upon and the aforesaid sum of Thirty Four Thousand Eight Hundred and 04-100 dollars ($34,800.04) according to the terms of one certain promissory note, of even date herewith executed by Wat Mayes to the order of C. M. Keys & Co., and payable as follows:

One note for $34,800.04 dated Oct. 28, 1901, payable one month after date, all payable at the office of C. M. Keys & Co., Nat. Stock Yds. Ill., and all with interest thereon at the rate of eight per cent per annum from date or according to the terms of any renewal or

extension of said note which ma ybe made by consent of said second party, its successors or assigns, and may be evidenced by the execution of a new note or notes, in place of said original note at or after maturity, for the amount of the debt then unpaid and any renewals or extensions thereof, and which said note the party of the first part hereby agrees to pay on maturity thereof, then these presents and everything herein contained shall be void, anything herein contained to the contrary notwithstanding. And it is hereby mutually covenanted and agreed between the parties hereto that if default be made in the payment of said sum of money, or any part thereof, or the interest thereon, according to the tenor and effect of said note, when the same becomes due and payable, or upon a failure to conform *or to* comply with any of the conditions and agreements herein mentioned, then the whole sum of money hereby secured shall, at the option of the party of the *of the* second part or the legal holder or holders of said note or notes, become due and payable at once without notice. And it is further agreed that in case of sale or disposal, or attempt to sell or dispose of the goods and chattels hereby mortgaged, or a removal of, or attempt to remove the same from the premises aforesaid, or an unreasonable depreciation in value, or if from any other cause the security shall become inadequate, or the party of the second part shall deem itself insecure at any time before said indebtedness is fully paid, whether the same be due or not, then and thenceforth it shall be lawful for the said party of the second part, its successors or assigns or its authorized agent, to enter upon the premises of the said party of the first part, or any other place or places wherein said goods and chattels or live stock aforesaid may be to remove and dispose of the same as aforesaid without resort to law, and without appraisement or notice (all rights of redemption, appraisement and notice of foreclosure required by law being hereby expressly waived) and all the equity of redemption of the said party of the first part, at public auction or private sale, to the person or persons who shall pay the highest price

for the same, and out of the avails thereof to retain the full amount of said obligation, with the interest thereon, according to the conditions thereof, together with all the reasonable costs and expenses attending the same, and commissions aforesaid, rendering to said party of the first part, or his legal representatives the surplus money, if any there shall be, anything to the contrary notwithstanding. And until default be made, as aforesaid, or until such time as the said party of the second part shall deem itself insecure, as aforesaid, the said party of the first part to continue in the peaceable possession of all of said goods and chattels, all of which in consideration thereof he agrees shall be kept in as good condition as the same are now, and taken care of at his own proper cost and expense, and upon the neglect or failure of said first party so to do, then said second party, its successors or assigns, may cause the same to be done, and for all expenses so incurred and sums expended, this obligation shall be a continuing security; and if from any cause said property shall fail to satisfy said debt and interest aforesaid, said party of the first part hereby agrees to pay the deficiency on demand.

In witness whereof, the party of the first part has hereunto set his hand and seal this 29th day of October, in the year of Our Lord One Thousand Nine Hundred and One (1901).

Wat Mayes (Seal).

Signed, sealed and delivered in presence of:

F. C. PINKERTON,

State of Illinois,

County of St. Clair, ss.

BE IT REMEMBERED, that on this 29th day of October, A. D., 1901, before the undersigned, a Notary Public duly commissioned and acting as such within and for the County of St. Clair aforesaid, personally came Wat Mayes to me well known to be the grantor described in and who executed and whose name is subscribed to the foregoing instrument, of writing as party thereto, and stated and acknowledged to me that he executed the same as his free act and deed for

the purposes and considerations therein mentioned.

In Testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in National Stock Yards in said County, the day and year first above written.

My term of office as Notary Public will expire Aug. 5, 1903.

(Seal) SAMUEL BUCKNELL,
Notary Public.

AFFIDAVIT OF OWNERSHIP.

State of Illinois,
County of St. Clair, ss.

To obtain credit for the within amount Wat Mayes being duly sworn, upon his oath, says that the property in number and kind as designated in the within instrument, is now located at the place or places stated in this instrument, and that the mortgagor herein is the lawful and absolute owner of said property described, that he has full power and authority to sell or mortgage the same and give clear title thereto, and that there are no liens or mortgages against said property.

WAT MAYES.

Subscribed and sworn to before me this 29th day of October, A. D. 1901.

SAMUEL BUCKNELL,
(Seal) Notary Public.

This affidavit filed this 31 day of Oct. 1901, at 2 o'clock P. M. Entered in Volume M. page 286.

CHAS. A. DAVIDSON,
(Seal) Register of Deeds.

CERTIFICATE OF RECORD.

United States of America,
Indian Terirtory,
Northern District, ss.

I, Charles A. Davidson, Clerk of the United States Court, and Ex-officio Recorder in and for the Northern District, Indian Territory, do hereby certify that the instrument hereto attached was filed for record in my office the 31 day of October, 1901, at 2 o'clock P. M., and duly recorded in Book M., page 286.

Witness my hand and seal of said Court, at Mus-

kogee, in said Territory, this 22d day of November, A. D., 1901.

CHAS. A. DAVIDSON,
Clerk and ex-Officio Recorder.

(CHATTEL MORTGAGE). Endorsed: M.-286. No. — CHATTEL MORTGAGE. From Wat Mayes, to C. M. Keys & Co., National Stock Yards, Ill. This instrument to be recorded. C. M. Keys & Co., National Stock Yards, Ills., North Dist. Ind. Ter. Filed for Record Oct. 31, 1901, 2 P. M. Chas. A. Davidson, Clerk U. S. Court."

On the same day Vinita National Bank filed its interplea setting up a Mortgage upon the attached property, and claiming that the plaintiff had security on other property ample to make its debt. The interplea can be found on page 42, and the sixth paragraph is as follows:

"SIXTH. That the plaintiff herein is fully secured and amply protected for the payment of the amount of his debt sued on, by mortgage given to said plaintiff by the said defendant, Wat Mayes, covering over $5200.00 worth of real estate, located in the town of Pryor Creek, Indian Territory, to secure the payment of said indebtedness, a certified copy of said mortgage is herewith filed, marked Exhibit "C" and made a part of this intervention.

WHEREFORE, the premises considered this intervenor asks that the levy of said writ of attachment upon the cattle covered by intervenor's mortgage be quashed, that said cattle be released and discharged from the custody of said marshal under said writ, or failing in that, that the court transfer this cause to the equity docket and compel plaintiff to exhaust its security to secure the debt sued on first so that this intervenor may have the property covered by his first mortgage lien to satisfy its debt as above set forth.

and such other and further relief as it may in the judgment of the court be entitled.

Wm. P. THOMPSON,
Attorney for Intervenor."

The Chattel Mortgage and renewal affidavits were set out. In view of an agreement of all parties stipulating for the payment of its claim, which can be found on page 185, the chattel mortgage and renewal are not set out: The mortgage on Real Estate can be found on pages 47 and 48, and is as follows:

"KNOW ALL MEN BY THESE PRESENTS, that Wat Mayes is indebted to the First Nat. Bank of Claremore, I. T., in the sum of Four Thousand Four Hundred Six and 62-100 Dollars as evidenced by his promissory note, date— Jan. 8, 1903, and one *one* year thereafter. And that to secure the payment of the same he by these presents bargains, sells and conveys unto said bank the following described lots and the improvements thereon located in the town of Pryor Creek, Indian Territory, within the limits of both the Cherokee and the United States Surveys, but described herein according to the Cherokee Survey, viz:

Lots No. 5, 6, 7 and 8 in block No. 81, Lots No. 2, block No. 59, Lots No. 8 in block 37; Lots No. 2 and 8 in block No. 66; Lot No. 12 in block No. 55; Lot No. 1 in block No. 54; the south half of Lot No. 2, block 77; Lots 2 and 4 in block No. 78; Lot No. 3 in block No. 30; Lots 2 and 4 in block No. 70. And Nannie R. Mayes his wife, in consideration of the money advanced on said notes hereby relinquishes and releases al lclaims to dower in and to said lots and improvement, in case the debt is paid at maturity, this conveyance shall become void. In case, however, the indebtedness according to the terms of said note or any renewal or extension thereof is not paid then the said bank is empowered to advertise the sale of the said lots or as many as it may deem necessary for two weeks in some news

paper published in the Northern District of the Indian Territory, and to sell the same for cash in hand to the highest bidder, the sale to take place in the town of Pryor Creek, I. T., at any convenient place to be selected by said bank and apply the proceeds toward paying the expenses of the sale and the indebtedness as far as the proceeds will extend returning the overplus if any to said Wat Mayes.

Witness the hands of the parties this 16th day of January, 1903.

WAT MAYES,
NANNIE MAYES."

On December 16th, 1905, the Citizens Bank files interplea, which can be found on pages 49, 50 and 51, and which is as follows:

"COMES NOW the Citizen's Bank and by permission of the Court files this its amended petition and interplea herein and respectfully shows the court:

FIRST, That it is a corporation organized under the laws of the United States for the Indian Territory, with its principal place of business at Pryor Creek, Indian Territory.

SECOND, that on the —— day of July, A. D., 1905, the plaintiff herein, The First National Bank of Claremore filed its suit against the defendant herein, Wat Mayes, and sued out a writ of attachment and caused said writ of attachment to be levied on certain property described in "Exhibit A" hereto attached; that said property was taken into custody by the United States Marshall for this district and that said property was afterwards, by order of Court turned over to George Mayes who was duly appointed receiver herein by said court, and is now in custody of said receiver

THIRD, that Wat Mayes, defendant herein, is indebted to your petitioner herein in the principal sum of One thousand Eight Hundred Twenty-four Dollars ($1,824.69) and Sixty-eight cents together with interest thereon, which said indebtedness is evidenced by two

certain promissory notes, which said notes are in words and figures as follows:

PRYOR CREEK, IND. TER., April 4, 1903.

Six months after date, for value received, we promise to pay to the order of the CITIZENS' BANK OF PRYOR CREEK, at Pryor Creek, I. T., the sum of Five Thousand Twenty-Six and 89-100 dollars, with interest at the rate of 8 per cent per annum from maturity until paid. The makers and endorsers of this note severally waive protest and notice of non-payment hereof, and if this note is collected by law, we agree to pay 10 per cent. of the principal as attorn*ies* fees; we also agree not to schedule any of our property to avoid the payment of this note.

WAT MAYES,
L. C. HARRISON,
GEO. W. MAYES.

Amt. $526.89, due Nov. 4, 1904.

No. 94.

P. O. Pryor Creek, I. T.

PRYOR CREEK, IND. TER., July 24, 1905.

Three months after date, for value received, we promise to pay to the order of the CITIZEN'S BANK OF PRYOR CREEK, Pryor Creek, I. T., the sum of Twelve Hundred Ninety-seven and 79-100 Dollars with interest thereon at the rate of 8 per cent per annum from maturity until paid. The makers and endorsers of this note severally waive protest and notice of non-payment hereof, andf, if this note is collected by law, we agree to pay 10 per cent of the principal as attorney's fees; we also agree not to schedule any of our property to avoid the payment of this note.

WAT MAYES.

No. 6161. Amt. $1297.79. Due Oct. 24, 1905.

FOURTH, that to secure the payment of said notes and for other valuable considerations, the defendant herein, Wat Mayes, on the 24th day of July, A. D., 1905, made, executed and delivered to your petitioner his certain chattel mortgage, a certified copy of which together with the endorsement thereon, is hereto attached and marked Exhibit "B" that said mort-

gage was duly filed in the office of the Clerk of the United States Court, in the Northern District of Indian Territory, at Pryor Creek, on the 24th day of July, A. D., 1905, at 9 o'clock A. M., as more fully appears from the endorsement on said copy.

FIFTH, that your petitioner is the owner of the notes aforesaid, and is entitled to receive payment therefor.

SEVENTH, that the property described in the above said mortgage is the identical property taken under the plaintiff's writ of attachment herein, and that your petitioner by virtue of the aforesaid mortgage has a lien on said property taken under said writ of attachment, to secure the payment of the above described notes.

EIGHTH, that on the eighth day of January, A D., 1913, defendant, Wat Mayes, made, executed and delivered to the plaintiff herein, First National Bank of Claremore, his certain mortgage on the following described property, to-wit:

Lots 5, 6, 7 and 8 in block 81; lot 2 in block 59; lot 8 in block 37; lot 2 and 8 in block 66; lot 12 in block 55; lot 1, in block 54; the south 1-2 of lot 2 in block 77; lot 2 and 4 in block 78; lot 3 in block 30 and lot— and 4 in block 70 in the town of Pryor Creek, Indian Terirtory.

That said mortgage was executed and delivered by said defendant to said plaintiff for the purpose of securing the indebtedness of defendant to plaintiff, which said indebtedness was made and is the foundation of this said suit and attachment herein; that the value of said above described premises is Four Thousand Dollars ($4,000.00).

WHEREFORE, the premises considered, your petitioner prays that it be given judgment against said defendant, Wat Mayes, in the principal sum of Eighteen Hundred Twenty-four and 68-100 Dollars. ($1824.68), together with interest thereon according to the tenor of the notes aforesaid; and your petitioner further prays that inasmuch as plaintiff has security upon two funds, it be required to foreclose its said mortgage on the above described property and apply

the proceeds therefrom to the payment of its said claim against defendant before it be allowed to resort to the fund created by the sale of the property herein attached, and that the said plaintiff be allowed only so much of said fund as will discharge the balance (if there be a balance after exhausting the first fund above stated) of its judgment against defendant. Your petitioner further prays that the property attached herein be sold and the proceeds be applied to the satisfaction of your petitioner's debt as above set out, and for such other and further relief as to the court shall seem just.

C. J. TAYLOR,
J. H. LANGLEY,
Attorneys for Intervenor.

I, R. A. Brown, do state on oath that I am president of the Citizen's Bank of Pryor Creek, I. T., the Interpleader herein, that I have read the foregoing petition of Intervention, and that the facts therein stated are true as I verily believe.

R. A. BROWN,
Pres't. Citizen's Bank.

Subscribed and sworn to before me this 5th day of Oct. A. D., 1905.

(Seal) F. M. WATTS,
Notary Public."

And on August 23rd, 1905, John C. Hogan filed interplea, and which can be found on page 52 and 53. and which is as follows:

"And now comes John C. Hogan, by permission of the Court, and files this, his petition and interplea. herein, and begs to show to the Court:

FIRST, That petitioner is a resident of the Northern District, of the Indian Territory.

SECOND, that on the —— day of July, 1905, The First National Bank of Claremore, filed its suit against the defendant herein, Wat Mayes, and caused a writ of attachment to be levied upon the property of the said defendant, to-wit: —— head of cattle and which

said property is now in the custody of the United States Marshal of the Northern District.

THIRD, that the defendant herein, Wat Mayes, is indebted to your petit-oner in the principal sum of $6187.00; together with interest thereon which said indebtedness is evidenced by one certain promissory note, dated the 27th day of July, 1905, and which said note is in words and figures as follows, to-wit:

"$6187.00.

PRYOR CREEK, I. T., July 27, 1905.

One day after date for value received, I promise to pay to the order of J. C. Hogan Six Thousand One Hundred Eighty-seven & No-100 Dollars, at the office of Campbell and Keys, Pryor Creek, I. T., with interest at the rate of 8 per cent per annum, from date until paid. Payable semi-annually, and if the interest be not paid when - due, to become as principal and bear the same rate of interest. The endorsers, sureties, guarantors, and assignors severally waive presentation for payment, protest and notice of protest for non-payment of this note and all defenses on the ground of any extension of time of its payment that may be given the holder or holders, to them or either of them, or to the maker or makers thereof.

WAT MAYES."

FOURTH, that on the 27th day of July, 1905, said defendant, Wat Mayes, for the purpose of securing the payment of said note, and for other valuable considerations, made, executed and delivered to your petitioner, his chattel mortgage on the property seized under the writ of attachment herein which said mortgage was duly filed for record in the office of the Clerk of the United States Court, in the Northern District of Indian Territory, at Pryor Creek, on the 28th day of July, 1905, which said mortgage together with the clerk's certificate of record thereof, is hereto attached and marked exhibit "A."

FIFTH, that by virtue of the mortgage aforesaid your petitioner has an interest and an equity in and a lien upon the property seized under the writ of attach-

ment aforesaid, which said property so seized, is the same property as that mentioned and described in and covered by your petitioner's mortgage aforesaid.

SIXTH, that the debt and interest aforesaid is now due and unpaid in the sum of $6,187.00 together with interest thereon at the rate of 8 per cent per annum from the 27th day of July, 1905.

WHEREFORE, the premises considered, your peti-oner prays judgment against said defendant, Wat Mayes, in the principal sum of $6187.00 together with interest thereon and that your petitioner's mortgage aforesaid be declared a lian on the property attached herein, that said property be sold and the proceeds thereof applied in satisfaction of said judgment in its proper order as may be by the court determined and for such other and further relief as to the court shall seem right and proper.

J. HOWARD LANGLEY,
JOHN B. TURNER,
Attorneys for Intervenor."

Mary D. Mayes interplead also, pages 54-55. By consent of all parties a receiver was appointed to take charge of the property. Page 58. He qualified and made report, which can be found on page 61, omitting the caption, which is as follows:

"To Honorable Joseph A. Gill, Judge of the United States Court:

Your Receiver, George W. Mayes, appointed to take charge of and dispose of the property attached in the above entitled case, respectfully submits for approval his following report:

As such receiver he took into his possession all of the property described in the return of the Marshal upon the writ of attachment belongin gto said Wat Mayes, and accompanied by J. D. Wilkins, U. S. Deputy Marshal, took an inventory of said property, which inventory is as follows, towit:

306 head of cows; 260 branded W on left shoulder, and 46 branded K on left side.

102 head of four year old steers, branded W on left shoulder.

85 head of two year old steers, branded W on left shoulder.

38 head of yearling heifers, branded W on left shoulder.

41 year of yearling steers, branded W on left shoulder.

55 head of calves, branded W on left shoulder.

5 bulls, branded W on left shoulder.

Cows branded W on left shoulder	260
Cows branded K on left side	46
Steers, four years old, branded W on left shoulder	102
Steers, two years old, branded W on left shoulder	85
Yearling heifers, branded W on left shoulder	38
Calves, branded W on left shoulder	55
Bulls, branded W on left shoulder	5
Yearling steers, branded W on left shoulder	41
Total	632 head

The discrepancy between the number of cattle*d* inventoried by your receiver and the return of the Marshal is accounted for as follows: Your receiver found a number of registered cows, heifers, and bulls, which were unbranded, belonging to Clarence Turner of Muskogee. Also several cows, heifers, calves and steers, in the brands of Nannie Mayes, the wife of said Wat Mayes, and in the brands of Hall and W*s*hie Mayes, sons of Wat Mayes. There were also several cows and steers belonging to Blue Keyes among the Wat Mayes' cattle at the time the Marshal attached the same. No doubt the arshal listed some of these cattle as branded W and belonging to said Wat Mayes.

The Marshal returned on his writ 98 head of two year old steers and 35 head of one year old steers. We were able to find only 85 head of two year old steers, and found 41 head of yearling steers. This discrepancy may be partially accounted for by the marshal

having counted some of the yearling for two year olds.

On 9-10-05 I shipped to the St. Louis market 10 head of cows which netted $197.37, os shown by account sales, marked Exhibit "A," hereto attached and made a part hereof. On 9-10-05, 1 shipped to the St. Louis market 12 head of calves, net $103.15, as shown by account sales, marked "Exhibit B" hereto attached and made a part hereof. On 9-27-05, I shipped to St. Louis market 8 head of four year old steers and one cow, net $2130.51, as shown by the account sales marked "Exhibit C," hereto attached and made a part hereof. On 10-12-05, I shipped to the St. Louis market, 26 head of cows, net $464.58, as shown by account sales, marked "Exhibit D" hereto attached and made a part hereof. On 10-13-05, I shipped to the Kansas City market 14 head of cows and one two year old steers, net $205.35 as shown by account sales, marked "Exhibit E," hereto attached and made part hereof. On 10-18-05, I shipped to the Kansas City market 13 cows and one calf, net $211.01, as shown by account sales, marked Exhibit "F," hereto attached and made a part hereof.

On 9-23-05, I sold at private sale to James Gamble 22 head of cows for $440.00; 9 yearling heifers for $117.00; and 1 bull for $50.00. On 9-4-05, I sold at private sale to Clay Robbins 78 head of two year old steers for $1560.00; 4 head of two year old steers for $56.00; 41 head of yearling steers for $492.00. On 10-30-05, I sold at private sale to J. C. Hogan 60 head of cows $1200.00 68 head of cows, $1190.00; 39 head of cows, $546.00; 20 head of yearlings heifers, $336.00; 2 head of yearling heifers, $15.00; 42 head of calves $336.00; 4 bulls $100.00; 34 four year old steers, $918.00; 2 two year old steers, $40.00; 7 two year old heifers, (cow) $87.50; 30 cows, black, $525.00.

RECAPITULATION.

9-10-05,	10 cows, "Exhibit A"	$ 197.37
9-10-05,	12 calves, "Exhibit B"	103.15
9-27-05,	68 steers, 1 cow, "Exhibit C"	2,130.00
10-12-05,	20 cows, "Exhibit D"	464.50

10-13-05,	14 cows, 1 steer, "Exhibit E"	205.35
10-18-05,	13 cows, 1 calf, "Exhibit F"	211.01
9-23-05,	22 cows, Gamble at $20.00	440.00
	1 bull, Gamble, at $50.00	50.00
	9 yearling heifers, Gamble, at $13.00	117.00
9- 4-05,	78 two year old steers, Robbins at $20.00	1,560.00
	4 two year old steers, Robbins at $14.00	56.00
	41 yearling steers, Robbins at $12.00	492.00
10-30-05,	60 cows, Hogan, at $20.00	1,200.00
	68 cows, Hogan, at $17.50	1,190.00
	39 cows, Hogan at $14.00	546.00
	20 yearling heifers, Hogan, at $12.50	250.00
	2 yearling heifers, Hogan, at $7.50	15.00
	42 calves, Hogan, at $8.00	336.00
	4 bulls, Hogan, at $25.00	100.00
	34 four year old steers, Hogan, at $27.00	918.00
	2 two year old steers, Hogan, at $20.00	40.00
	7 two year old heifers, Hogan at $12.50	837.00
	30 black cows, Hogan, at $17.50	525.00
Total		$11,234.47

I also shipped to St. Louis on 9-10-05, 29 head of calves belonging to Wat Mayes, which were unbranded and included in the attachment, which netted $217.00: as shown by account sales, marked "Exhibit G," hereto attached and made a part hereof.

Dated at Pryor Creek, Indian Territory, this 9th day of November, 1905.

GEO. M. MAYES, Receiver."

Wat Mayes filed answer and cross-complaint to

the interplea of C. M. Keys & Co., & Stock Yards Bank, see page 65-65-66- and 67. C. M. Keys & Co., & Stock Yards Bank filed an answer to the cross-complaint which can be found on pages 68 and 76.

First National Bank of Vinita filed its plea of intervention, see page 77, omitting the caption, which is as follows:

"INTERPLEA OF FIRST NATIONAL BANK OF VINITA.

Comes now the First National Bank of Vinita, and represents and shows unto the Court that it is a corporation organized under the laws of the United States and doing business as a National Bank in Vinita, Indian Territory.

That it solds an unsatisfied mortgage on all of the cattle attached herein, which was executed by the defendant, Wat Mayes, to it on the 16th day of January, 1903, which said mortgage was thereafter recorded in the office of the Clerk of the United States Court in the Indian Territory, Northern District at Vinita, in which District the property mentioned therein was located at the time of the making of the mortgage and has at all times since been located, and that said mortgage thereafter and prior to the running of the attachment herein was indexed in the office of the Clerk of the United States Court in the Indian Territory, Northern District at Pryor Creek, the property being located in the Pryor Creek Recording District. That there is now due on said mortgage the sum of $3778.19; and said mortgage by its terms is past due, and a copy of said mortgage is as follows:

"CHATTEL MORTGAGE.

Know all men by these presents. That Watt Mayes, and —— of the first part, in consideration of the sum of Two Thousand Nine Hundred & Eight 27-100 dollars, to him in hand paid by the First National Bank of Vinita, of the second part, the receipt where-

of is hereby acknowledged, has bargained and sold and by these presents does bargain and sell, unto the said party of the second part, his executors, administrators, and assigns, all the following articles of personal property, the same being the absolute property of, and now in possession of said party of the first part at his farm or ranch, in Cooweecoowee District, Cherokee Nation, and within the Northern District, Indian Territory, towit:

All his cattle of every description consisting of steers, cows, heifers, calves and bulls, and being as estimated, 475 4 year old steers, some branded 4 on left thigh, some running W on left shoulder; 200 coming 3 year old steers branded *branded* running W on left shoulder; 260 coming two year old steers, same brand; 430 coming yearlings, mixed some branded 4 on left thigh; 85 coming 2 year old heifers, branded running W on left shoulder; 25 bulls, the cattle are supposed to be located about three miles east of Pryor Creek but this mortgage covers all the cattle, no matter where located; cattle above described have various mortgages on them, but the exact amount of the mortgages on the respective classes of cattle is unknown to the parties hereto, and it may be that all the cattle are not covered by mortgage, but the mortgagor does not represent that any of the cattle are free from mortgage.

PROVIDED always, and these presents are upon this express condition: That if the said party of the first part shall pay or cause tobe paid, to the said party of the second part, or to his executors, administrators or assigns, the fees for releasing this mortgage, and the aforesaid sum of $2908.27, according to the terms of 2 certain promissory notes of which the following is a synopsis, viz: Dated Oct. 6, 1902, note due 6 mos. 190— for $2333.56, Date Oct. 12, 1902, note due 6 mos. 190— fof $574.71, signed by Datt Mayes; rate of interest 8 per cent from mty., then *teh-se* presents and everything herein contained shall be void. But, if default shall be made in the payment of said sum of money, or any part thereof, or the interest thereon, at the time or times, when by the condition of the said

notes the same shall become payable, or if said party of the second part shall at any time deem himself insecure for any cause without assigning any reason therefor, or if said property is removed from the district aforesaid, then and thenceforth it shall be lawful for said party of the second part, his executors, administrators or assigns or his authorized agent to declare said note and mortgage due, and to take said goods and chattels wherever the same may be found. and dispose of the same, to so much thereof as may be necessary without appraisement (the appraisement required by law being hereby expressly waived(at public auction, at the place where the said property is found or taken, or at Pryor Creek, I. T., for cash in hand, upon two weks' notice in some newspaper published in the Northern District or the county where taken, or by written notices posted in four conspicuous places near the property, at which sale any of the parties hereto may purchase as other parties, and out of the proceeds of said sale, the said party of the second part to retain the sum due him, as herein set forth and the cost of this trust, and of sale, rendering the over-plus, if any, to the said party of the first part. his executors, administrators or assigns; and if from any cause sail property shall fail to staisfy sail debt and interest aforesail, sail party of the first part hereby agrees to pay the deficiency, and until default be male as aforesaid, or until such time as the party of the second part shall deem himself insecure as aforesaid, the said party of the first part to continue in the peaceable possession of all the said goods and chattels, all which, in consideration hereof, he engages shall be kept in as good condition as the same now are. and taken care of at his proper cost and expense.

In witness whereof, the party of the first part has hereunto set his hand this 16th day of January, A. D. 1903. WAT MAYES (Seal.)

United States of America,

Indian Territory, Northern District:

On this 16th day of Jan. A. D. 1903, before me a Notary Public, within and for said Northern District,

Indian Territory, appeared in person Watt Mayes, and ——— to me personally well known as the person whose name appears upon the within and foregoing conveyance as the party grantor, and stated htat he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, on the date last above written.

(Seal) JAMES M. KEYS, Notary Public.

CERTIFICATE OF RECORD.

United States of America,

Indian Territory, Northern District, ss.

I, Charles A. Davidson, Clerk of the United States Court, and ex-officio Recorder in and for the Northern District, Indian Territory, do hereby certify that the instrument hereto attached was filed for record in my office the 16 day of Jan. 1903, at 2 P. M., duly recorded in Book B, page 68.

Witness my hand and seal of said Court, at Vinita, in said Territory, this 23 day of January, A. D. 1903.

CHAS. A. DAVIDSON,
Clerk and Ex-Officio Recorder."
By.....Deputy.

That under the said mortgage the interpleader herein, First National Bank of Vinita, is entitled to the property attached and to the proceeds.

The premises considered, it prays that its rights herein may be investigated, and that upon a hearing it be awarded the property attached herein, or in the event of its having been sold, its proceeds, and that it be accorded all other and further relief to which in equity and good conscience it is entitled.

(Signed)

FIRST NAT. BK. OF VINITA
By W. H. Kornegay, Attorney."

On December 5th, 1905, plaintiff filed an answer to the interplea of C. M. Keys & Company & Stock

Yards Bank, which can be found on page 80, omitting the caption, which is as follows:

"ANSWER OF PLAINTIFF TO INTERPLEA OF C. M. KEYS & CO. AND STOCK YARDS BANK.

The plaintiff herein for answer to the interplea of C. M. Keys & Co., a partnership composed of John M. Keys and Hugh Mills and Stock Yards Bank, says:

That it has not sufficient knowledge or information to form a belief as to whether or not the defendant, Wat Mayes, is indebted in any manner to the interpleader, and it has not sufficient knowledge or information to form a belief as to whether or not the defendant Wat Mayes, executed any note to the interpleader, or whether the interpleader holds any note executed by him; and it says it has not sufficient knowledge or information to form a belief as to whether or not the interpleader holds any mortgage executed by Wat Mayes or anyone else, upon the property attached in this case. Neither has it sufficient knowledge or information to form a belief as to whether or not any mortgage so executed was recorded or filed for record at any place.

It therefore denies that the interpleader herein holds any note or mortgage executed by Wat Mayes, and it therefore denies that the interpleader herein has any lien for any sum upon the property attached in this case, and it prays for judgment for its costs.

W. H. KORNEGAY,
Attorney for Plaintiff."

Plaintiff filed a similar answer to interplea of First National Bank, and Mary D. Mayes, and J. C. Hogan, and Citizens Bank and Vinita National Bank. page 82 and 86. In the answer to the interplea of Vinita National Bank it set up the insufficiency of the real estate to secure its debt, page 87. The cause on motion of one of the intervenors was transferred to the

equity docket, and referred to the Master in Chancery, and evidence was taken, beginning on page 88.

The testimony of Wat Mayes begins on page 89 of the record in case 263, and runs to the bottom of page 98. He testified to the amounts due the various interpleaders, and to the making of their respective mortgages, and claimed in evidence that he did not owe C. M. Keys & Company and Stock Yards Bank. He testified, at page 91, that very few of the cattle attached were the ones embraced in the mortgage of the Vinita National Bank, but that a great many of them were the increase. He stated that he could not say that the majority of them were the increase, page 91. On page 92 he said he thought there was enough of the cattle embraced in the mortgage of the Vinita National Bank, together with their increase, to pay its debt. He testified further that he had given the real estate mortgage to the First National Bank of Claremore to secure it on one of the notes sued on, and another note. He testified that the cattle that were attached were the same cattle that the Citizens Bank had a mortgage on, and J. C. Hogan, and Mary D. Mayes, had a mortgage on. The various mortgages, and the notes, during the progress of his testimony were introduced in evidence. The witness further testified that he was shipping the cattle out when they were attached, and did not have enough left to pay his debts. He testified that the cat-

tle had been running, during the last five or six years, three miles from Pryor Creek, south and east. He further testified that he did not know how many cattle he had of the various brands on the 15th day of December, 1899, the date of the mortgage to the Vinita National Bank, and that he had more cows than were embraced in that mortgage. He further testified that the cattle embraced in the mortgages were running just east of Pryor Creek about eight (8) miles South and West and were never in the Creek Nation.

At page 96, the intervener, Stock Yards Bank, introduced a note, dated May 1st, 1905, renewing in part a note dated Oct. 28, 1901, and payable to the order of C. M. Keys & Company, the note being as follows:

$12,026.74.

PRYOR CREEK,INDIAN TERRITORY, May 1,1905

Six months after date I promise to pay to the order of C. M. Keys & Company, at National Stock Yards, Illinois, Twelve Thousand Twentysix- & 24-100 dollars. Value received, negotiable and payable, without defalcation or discount, with interest at the rate of seven per cent per annum from date until paid. This note is given in part renewal of a certain note of the maker hereof, dated Oct. 2, 1901, for $34,800.00, secured by mortgage, said mortgage security is retained to this renewal note.

(Signed) WAT MAYES.

No. 2,075. Due Sep. 1'05.

P. O. Pryor Creek, I. T.

(Indorsed on back as follows:) C. M. Keys & Co., Presentment, demand, protest and notice of protest. waived, and payment at maturity guaranteed. C. M. Keys & Co."

And another note, dated January 16, 1905, which is as follows:

$2,970.95.

PRYOR CREEK, INDIAN TERRITORY,
Jan. 16, 1905.

Six months after date I promise to pay to the order of C. M. Keys & Co., at National Stock Yards, Illinois, Two Thousand Nine Hundred Seventy and 95-100 dollars. Value received, negotiable and payable without defalcation or discount, with interest at the rate of seven per cent per annum from date until paid. This note is given in part renewal of a certain note of the maker thereof, dated Oct. 28, 1901, for $34,800.04, secured by mortgage, and said mortgage security is retained to this renewal note.

(Signed) WAT MAYES.

No. 2,066.

Due July 16, 1905.

P. O. Pryor Creek, I. T."

(Indorsed on back as follows:) "C. M. Keys & Co.. Presentation, demand, protest and notice of protest waived and payment at maturity guaranteed. C. M. Keys & Co.

Sixty dollars $60.00 to April 7, 1905.

$128.39 pd. Aug. 3, 1905."

The Stock Yards Bank introduced a Chattel Mortgage to C. M. Keys & Company, which was marked "Exhibit B" to the pleading of intervention of the Stock Yards Bank. The mortgage referred to it above set out.

F. C. Pinkerton, testified on page 97. He testified thatwhen the notes were delivered to the Stock Yards Bank that the notes were not due, and the mortgages were assigned to the bank.

At page 98 Wat Mayes being re-called, testified

that there were about forty (40) head of teh cattle that were mortgaged to the Vinita National Bank that were among the cattle attached, 15 head being of the W brand and 25 head being in the C and slash brand, and the cows were shipped out and sold for $17.50 per head; and that most of the cattle that were attached were the increase of the original cows since the giving of the mortgage.

Charles A. Davidson, the Clerk of the Court, testified and his testimony can be found on page 99. He testified that he was Clerk of the United States Court, having charge of the office in Muskogee during 1900, 1901 and 1902 to the first of July, and that the Northern District was divided into the Northern and the Western on the 1st of July, 1902, and that he remained Clerk of the Northern District, with headquarters at Vinita.

He further testified that from July 1st, 1902 to the 19th of February, 1903, each place of holding Court was made a recording district, and was described by metes and bounds. He further testified that Congress did not make any appropriation for the indexing and transferring of mortgages to the different recording districts, and for that reason his office did not provide machinery for that purpose. He further testified that from the date of the recording act, February 1903, that each office was supplied with a full set of mort-

gage records and indexes for filing, and that a few mortgages were transferred from one recording district to another, and that after 1903 in a few instances he transferred and re-indexed some mortgages at the request of the mortgagee. He further testified, that if a mortgage was recorded at Vinita that the method of procedure to get the mortgage indexed at Pryor Creek was upon a written request from the mortgagee, and that it was indexed without pay. He further testified that in the Northern District on February 19, 1903, there were 7,976 filed mortgages, and 291 recorded mortgages; and that it was impossible to find out what mortgages should be transferred to the various recording districts. He further testified that at Muskogee there were on July 1st, 1902, between eighty (80) thousand and one hundred thousand (100) mortgages filed and recorded.

J. Howard Langley was sworn, and testified, page 101. He testified as to the value of the real estate mortgaged by Wat Mayes to the First National Bank of Claremore, and that he thought it was worth Three thousand five hundred dollars ($3,500.00), and would bring on mortgage foreclosure from Two thousand Five Hundred dollars ($2,500.00) to Three Thousand dollars ($3,000.00). He further testified as to an examination of the records of Pryor Creek, and the memorandum he made of the record, is as follows:

"A. I made a memorandum of the record. In Book "1" of general indexes to deeds and mortgages, Fifth Recording District of Indian Terirtory, at Pryor Creek, page 156, appears "ayes, Watt;" in the column headed "Grantee" opposite Mayes, Wat, appears "First National Bank of Vinita;" in the column headed "kind of Instrument," on the same line appears "C. M.;" in the column headed "Numbers" "1-16-1903, 2 A. M.;" on the same line in the column headed "Recorded in Book" appears "B;" on the same line under the column headed "page" appears "68;" and between the words "Mayes, Watt" and the words "First National Bank of Vinita" in parenthesis, in red ink, it written "At Vinita." There is no date by which it can be determined when this entry was made, but it appears between two entries both of which were made on the first day of December, 1904."

Account sales were introduced in evidence, and can be found on pages 103 to 108. J. C. Hogan mortgage, Exhibit "A" can be found on page 108. It was duly recorded, on the 28th of July, 1905, at Pryor Creek. The second mortgage on the real estate to the First National Bank of Vinita can be found on page 110. It was filed on the 19th day of June, 1905, at Pryor Creek, fo rrecord. A stipulation was filed, on page 112, with reference to the mortgage of the Vinita National Bank, and on 113 with reference to it, and with reference to the Keys mortgage stipulation was filed, on page 113, which omitting the caption, is as follows:

"IT IS STIPULATED between pl't'f and intervenors, C. M. Keys & Co., & Stock Yards Bank, that at the time of running the attachment it was known to

plaintiff that a mortgage was of record at Muskogee in favor of intervenors calling for $34,800 & 4-100, which mortgage is in proof.

(Signed)

FIRST NATIONAL BANK OF CLAREMORE,
By W. H. Kornegay, Att'y.
NEV. CAMPBELL,
R. F. BLAIR,
Atty's. for Intervenors C. M. Keys & Co. & Stock Yards Bank.

And, on page 114, a stipulation was filed, which is as follows:

"Intervenors J. C. Hogan & Citizens Bank admit, each of them, knowledge of the existence of the above mentioned mortgage at the time of the execution of the mortgags to said intervenors, J. C. Hogan & Citizens Bank.

(Signed)

J. HOWARD LANGLEY,
Att'y. for J. C. Hogan.
C. J. TAYLOR,
Att'y. for Citizens Bank.
NEV CAMPBELL. &
R. F. BLAIR."

The Master made a Report, which can be found on page 114 to page 122, and was filed on the 30th day of August, 1906; omitting the caption which is as follows:

"MASTER'S REPORT.

Honorable Joseph A. Gill, United States Judge, Presiding:

Albert M. Etchen, Master in Chancery, respectfully reports that, pursuant to the general order of reference, he has examined the files and taken the evidence in the above entitled cause, and finds therefrom as follows:

That the defendant Wat Mayes, on the 15th day of December, 1899, being indebted to the Vinita National

Bank, made, executed and delivered to said bank his promissory note in the su mof $4,500.00 with interest thereon at the rate of ten per cent. per annum from maturity, said note to be due and payable six months after date.

That to secure said note, said Wat Mayes made, executed and delivered to said Vinita National Bank a chattel mortgage on the following described property, to-wit:

Five hundred head of cows, two year old and upwards, branded in the following brands, to-wit: 100 branded C on right side; 100 branded ——— on left thigh; 300 branded W on left shoulder; said cattle also branded with various other brands. The above described cattle being all the cows owned by party of the first part 2 years old and up. Said cattle being on defendant's ranch in Cooweescoowee District, Cherokee Nation and within the Northern District of the Indian Territory.

That said mortgage was filed on the 29th day of December, 1899, at 2 o'clock P. M. and entered on page 113, Book 00 of Minutes of Mortgages, by James A Winston, Clerk of the United States Court and ex-officio recorder for the Northern District of the Indian Territory.

That said mortgage has since been renewed by filing renewal affidavits in the office of the Clerk of the United States Court and ex-officio recorder, at Muskogee, Indian Territory, on the following dates, December 14th, 1900; December 12th, 1901; December 20th, 1902; December 14th, 1903; December 12th, 1-04.

That thereafter defendant made payments on said note, and reduced the amount thereof to $729.04, which sum is due said Vinita National Bank from said defendant.

That thereafter and on the 28th day of October, 1901, the defendant Wat Mayes, made, executed and delivered to C. M. Keys & Company his certain promissory note in the sum of $34,800.04 with interest thereon at the rate of 8 per cent per annum from date thereof.

That said defendant to secure said note made, executed and delivered to said C. M. Keys & Co., a chattel mortgage upon the following described property:

Six Hundred (600) three year steers; six hundred (600) cows; four to eight years;.one hundred forty thre (143) four year steers; three hundred twenty five (325) two year steers; one hundred (100) two year heifers; thre hundred fifty (350) yearling steers and heifers; five hundred (500) last spring calves; twenty (20) bulls; five bulls coming two year old (the 20 bulls are coming four year old). Above mentioned cattle are branded thus W on left shoulder, with the exception of a few of the cows and thre yeare steers which have ——— on right shoulder, and about twelve of the last spring calves have K on both sides. Eleven four ——— steers branded O on left loin; thirty-five two year steers; thirty-eight three year steers; gourteen two year heifers; ten four year bulls; eighty four cows three to eight years; all branded K on both sides. One Hundred forty ton cotton seed; three hundred fifty ton of hay; one thousand bushels of corn; six hundred acres of shocked fodder, and three hundred acres of shocked fodder rented. These cattle are located on said Mortgagor's ranch, three miles southeast of Pryor Creek, I. T."

That said mortgage was filed for record in the office of Charles A. Davidson, Clerk of the United States Court and Ex-Officio Recorder in the Northern District of the Indian Territory, at Muskogee, Indian Territory, on the 31st day of October, 1901, at 2 o'clock P. M. and recorded in Book M page 286.

That thereafter and before said note became due, said C. M. Keys & Company, for a valuabl econsideration, sold and transferred said note to Stock Yards Bank, presentment, demand, protest and notice of protest being waived and payment at maturity guaranteed by said C. M. Keys & Company.

That thereafter said defendant made settlement with said Stock Yards Bank by payment of a portion of said note and executed and delivered his promissory not for the remainder thereof, and from time to time

thereafter said defendant made various paymnts upon said indebtedness, and on the 1st day of March, 1905, made, executed and delivered his promissory note as an evidence of the remaining indebtedness due said C. M. Keys & Company, in the sum of $12,026.74, together with interest thereon at the rate of seven per cent per annum from date thereof; also one certain promissory note of date January 16th, 1905, in the sum of $2,970.95, payable to the order of C. M. Keys & Company together with interest thereon at the rate of seven per cent per annum from date thereof.

That thereafter, and before said notes became due, for a valuable consideration, said C. M. Keys & Company endorsed, negotiated and sold to intervenor, Stock Yards Bank, said notes, together with the mortgage heretofore described.

That there is now due and unpaid upon said indebtedness the sum of $15,288 8.69.

That thereafter, and on the —— day of February, 1905, the exact date not being shown by the evidence, defendant Wat Mayes, made, executed and delivered to C. M. Keys & Company, his certain promissory note in the sum of $500.00 which, together with interest thereon aggregates the sum of $520.00.

That all of said indebtedness as evidenced by said notes is included in and covered by said mortgage.

That on the 8th day of January, 1903, said Wat Mayes, for a valuable consideration, made, executed and delivered to the First National Bank of Claremore, Indian Territory, his certain promissory note in the sum of $4,206.62, with interest thereon at the rate of eight per cent per annum from maturity until paid; that said note after its making was extended to January 8th, 1905.

That thereafter, and on the 13th day of July, 1904, said defendant Wat Mayes, for a valuable consideration, made, executed and delivered to the First National Bank of Claremore, Indian Territory, certain promissory note in the sum of $356.75 with interest thereon at the rate of eight per cent per annum from maturity until paid.

That there is due said First National Bank of Claremore, Indian Territory, from the said Wat Mayes, upon an account the sum of $43.55, and interest thereon at the rate of six per cent per annum from and after 26th day of November, 1904; and also the sum of $66.12 with interest thereon at the rate of 6 per cent per annum from and after the 5th day of June, 1905.

That on the 16th day of January, 1903, said Wat Mayes to secure said notes, made, executed and delivered to the First National Bank of Claremore, Indian Territory, his certain mortgage on the following described lots and improvements located thereon, in the town of Pryor Creek, Indian Territory, described according to the Cherokee Surveys as follows:

Lots No. 5, 6, 7 and 8, in block No. 81; lot 2, Block No. 59; Lot No. 8 in block No. 37; Lots No. 2 and 8 in block No. 66; Lot No. 12, in block No. 55; Lot No. 1, in block No. 54; the south 1-2 of Lot No. 2, block 777. Lots 244 in block No. 78; Lot No. 3 in block No. 30; Lots 2 and 4 in block No. 70.

That thereafter and on the 7th day of December, 1903, at 10 A. M., said mortgage was duly filed for record in the office of J. C. Burgess, Deputy Clerk of the United States Court and Ex-Officio Recorder at Pryor Creek, Indian Territory, and duly recorded in Book A, page 193.

That on the 16th day of January, 1903, said defendant Wat Mayes made, executed and delivered to the First National Bank of Vinita a chattel mortgage in the sum of $3,778.19 on the following described property, located in the Northern District of the Indian Territory, to-wit:

"All his cattle of every description consisting of steers, cows, heifers, calves and bulls, and being as estimated 475 4 year old steers, some branded 4 on left thigh, some running W on left shoulder; 200 coming 3 year old steers, branded running W on left shoulder; 260 coming two year old steers, same brand; 430 coming yearling mixed; same brand. 730 cows, some branded running W on left shoulder, some branded 4

on left thigh; 85 coming 2 year old heifers branded running W on left shoulder; 25 bulls; the cattle are supposed to be located about three miles south of Pryor Creek, but this mortgage covers all cattle, no matter where located; cattle above described have various mortgages on them, but the exact amount of the mortgages on the respective classes of cattle is unknown to the parties hereto, and it may be that all teh cattle are not covered by mortgage, but the mortgagor does not represent that any of the cattle are free from mortgage."

That thereafter, and on said 16th day of January, 1903, said mortgage was duly acknowledged, and was thereafter filed for record in the office of the Clerk of the United States Court and Ex-Officio Recorder for the Northern District of the Indian Territory, at Vinita, Indian Territory, and was recorded in Book B page 68, and was thereafter indexed on the first day of December, 1904, in the office of the Deputy Clerk of the United States Court and Ex-Officio Recorder at Pryor Creek, Indian Territory.

That on the 5th day of June, 1905, said Wat Mayes, to secure the payment on said notes, made, executed and delivered to the First National Bank of Vinita, Indian Territory, his mortgage on the following described property, as shown by the Cherokee Surveys, to-wit:

"Lots 5, 6, 7 and 8, in block No. 81; Lot No. 2 in block No. 59; Lot No. 8 in block No. 37; oLts No. 2 and 8 in block No. 66; Lot No. 12 in block No. 55; Lot No. 1 in block No. 54; South 1-2 of Lot No. 2 in block No. 77; Lots No. 2 and 4 in block No. 78; Lot No. 3 in Block No. 30; Lots No. 2 and 4 in block No. 70, in the town of Pryor Creek, Inidan Terirtory.

That said mortgage was duly recorded in the office of J. C. Burgess, Deputy Clerk of the United States Court and Ex-Officio Recorder on the 19th day of June, 1905, at 5 o'clock P. M., and recorded in Book C, page 528.

That on the 4th day of April, 1903, said defendant Wat Mayes made, executed and delivered his certain

promissory note to the Citizens Bank of Pryor Creek, in the sum of $526.89 with interest thereon at the rate of 8 per cent per annum from and after November 4th, 1903.

That thereafter on the 24th day of July, 1905, said defendant Wat Mayes, made executed and delivered to the Citizens Bank of Pryor Creek, his certain promissory note in the sum of $1,297.79, with interest thereon at the rate of 8 per cent per annum from and after the 24th day of October, 1905.

That to secure the payment of said notes ,the defendant Wat Mayes, on the 24th day of July, 1905, made, executed and delivered to the said Citizens Bank of Pryor Creek, his certain chattel mortgage on the following described property, located in the Northern District of the Indian Territory, to-wit.

330 head of cows from three to six years old, branded W on left shoulder; forty five head same as above branded K on left side; 120 four year steers branded W on left shoulder; 100 two year old steers branded W on left shoulder; 75 yearling steers branded W on left shoulder; 30 yearling heifers branded W on left shoulder; 60 calves branded W on left shoulder."

That thereafter and on the 24th day of July, 1905. at 9 A. M. said mortgage was duly filed in the office of J. C. Burgess, Deputy Clerk of the United States and Ex-Officio Recorder at Pryor Creek, Northern District of the Indian Territory.

That on the 17th day of March, 1903, said Wat Mayes, made, executed and delivered his certain promissory note in the sum of $1,440.00 to Mary D. Mayes. with interest thereon at the rate of eight per cent per annum from and after November 13th, 1903.

That thereafter, on the 2nd day of August, 1905. and for the purpose of securing said note, said Wat Mayes, executed and delivered to said Mary D. Mayes. a chattel mortgage on the following described property located in the Fifth Recording District of the Northern District of the Indian Territory, to-wit:

"45 head of cows from three to six years old,

branded K on left shoulder; 330 head of cows from three to six years old, branded W on left shoulder; 120 head of four year old steers; 100 head of two year old steers; 60 head of one year old steers; 40 head of one year old heifers; *0 head of calves, and 3 bulls, all branded W on left shoulder; and two red bulls, no brands. All of said stock is now kept on the premises and in the pastures of said grantors in said recording District."

That said mortgage was duly filed at Pryor Creek, Indian Territory, on the 3rd day of August, 1905, at 4 o'clock P. M. by J. C. Burgess, Deputy Clerk of the United States Court, and Ex-Officio Recorder.

That thereafter, and on the 27th day of July, 1905, said Wat Mayes, made, executed and delivered his certain promissory note to J. C. Hogan, in the sum of $6,-187.00 with interest thereon at the rate of eight per cent per annum from date thereof.

That on said 27th day of July, 1905, said defendant Wat Mayes, for the purpose of securing the payment of said note, made, executed and delivered, to the said J. C. Hogan, his chattel mortgage upon the property seized under the writ of attachment herein.

That thereafter on the 28th day of July, 1905, said mortgage was duly filed for record in the office of the Clerk of the United States Court and Ex-Officio Recorder for the Northern District of the Indian Territory, at Pryor Creek.

That on the 20th day of Julq, 1905, plaintiff caused a writ of attachment to issue out of the United States Court at Vinita, Indian Territory, upon certain property of the defendant; and that the United States Marshal for the Northern District of the Indian Territory, took into his possession under said writ, the following described property, to-wit:

262 cows branded W on left shoulder; 45 black cows, branded K on left side; 102 four year old steers branded W on left shoulder; 98 2 year old steers branded W on left shoulder; 35 1 year old steers, branded W on left shoulder; 39 1 year old heifers,

branded W on left shoulder; 7 bulls, branded W on left shoulder; 60 calves branded W on left shoulder."

That said property taken under and by virtue of said order of attachment is the same property as was included within and covered by said several mortgages executed by said defendant to said plaintiff, and the various intervenors herein.

That sai dorder of attachment was also personally served on the defendant Wat Mayes, at Pryor Creek, Indian Territory, on the 22d day of July, 1905.

Thereafter and on the 23rd day of August, 1905. George W. Mayes, was, by order of the Court, duly appointed receiver, with authority to take charge of the property attached in said action.

That thereafter and on various dates, the property taken under said attachment was duly sold in accordance with the orders of Court, and that there was realized from said sale the sum of $11,234.47.

The law with reference to recording and filing mortgages applicable to this case is as follows:

Chapter 145 U. S. Statutes at Large, Approved March 1st, 1895, is in part as follows:

"The Northern District shall consist of all the Creek Country and the Seminole Country, all of the Cherokee Country, all of the country occupied by the Indian Tribes in the Quapaw Indian Agency, and the townsite of the Miami Townsite Company, and the places of holdjng courts in said District shall be at Vinita, Miami, Tahlequah and Muskogee."

Chapter 182 U. S. Statutes at Large, Approved May 2nd, 1890, is in part as follows:

"They (the clerk and deputy clerks of the United States Court) shall also be ex-officio recorders within their respective divisions, and as such they shall perfor msuch duties as are required of recorders of deeds under the said laws of Arkansas, and receive the fees and compensation therefor which are provided in said laws of Arkansas for like service."

Mansfield's Digest, Section 4742 provides as follows:

"All mortgages, whether for real or personal es-

tate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded, if for lands, in the county or counties in whcih the lands lie, and if for personal property in the county in which the mortgagor resides."

Chapter 136, U. S. Statutes at Large, Approved February 3rd, 1897, is in part as follows:

"That Section 4742 of Mansfield's Digest of the Laws of Arkansas heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following:

Provided, that if the mortgagor is a non-resident of the Indian Territory, the mortgage shall be recorded i nthe judicial district in which the property is situated at the time the mortgage is executed."

Chapter 888 U. S. Statutes at Large, Approved May 27th, 1902, is in part as follows:

"That the Clerk's Office at Vinita shall also be the recording office for the Northern District."

Chapter 707, U. S. Statutes at Large, Approved February 19th, 1903, is in part as follows:

"That Chapter 27 of the Digest of the Statutes of Arkansas known as Mansfield's Digest of eighteen hundred and eighty-four, is hereby extended to the Indian Territory, so far as the same may be applicable and not inconsistent with any law of Congress; Provided, that the Clerk or Deputy Clerk of the United States Court of each of the Courts of said Territory shall be ex-officio recorder for his district and perform the duties required of recorded in the chapter aforesaid, and use the seal of such court in cases requiring seal, and keep the records of such office at the office of said clerk or deputy."

Chapter 707 U. S. Statutes at Large, Approved February 19th, 1903, is in part as follows:

"It shall be the duty of each clerk or deputy clerk of such court to record in the books provided for his office all deeds, mortgages, deed in trust, bonds, leases, covenants, defeasances, bills of sale, and other instru-

ments of writing of, or concerning lands, tenements, goods or chattels; and where said instruments are for a period of time limited on the face of the instrument they shall be filed and indexed, if desired by the holder thereof, and such filing for the period of twelve months from the filing thereof, shall have the same effect in law is if recorded at length."

Chapter 707 U. S. Statutes at Large, Approved February 19th, 1903, is in part as follows:

"All instruments of writing, the filing of which is provided for by law shall be recorded or filed in the office of the Clerk or Deputy Clerk at the place of holding court in the recording District where said property may be located, and which said recording districts are bounded as follows: * * * * District numbered five, beginning at a point on the Eastern boundary line of the Indian Terirtory where same is crossed by the township line between townships twenty-thre and twenty-four North; thence south along said Eastern boundary line to the township line between township nineteen and twenty north; thence west on said township line to the range line between ranges seventeen and eighteen east, thence north on said range line to the township line between townships twenty-three and twenty-four North; thence east on said township line to the place of beginning. The place of record for District numbered five shall be Pryor Creek."

Chapter, 707 U. S. Statutes at Large, Approved February 19th, 1903, is in part as follows:

"Such instruments heretofore recorded with the Clerk of any United States Court in the Indian Territory shall not be required to be again recorded under this provision, but shall be transferred to the indexes without further cost, and such records heretofore made shall be of full force and effect, the same as if made under this statute."

That all of said property covered by said mortgage was at the date of the execution of said mortgages by said Wat Mayes, to the various mortgages herein within what now comprises recording district numbered five.

That prior to th 27th day of May, 1902, all mortgages executed by defendant Wat Mayes to the various mortgagees heretofore named herein were properly filed for record at Muskogee, Indian Territory.

That subsequently on the 27th day of May, 1902, by the Act of Congress approved on said day, making Vinita, Indian Territory, a place for filing and recording mortgages on property located in the Northern District of the Indian Territory, it was necessary to file or record all mortgages with the clerk of the United States Court and Ex-Officio recorder at Vinita, Indian Territory.

That thereafter by the Act of Congress approved February 19th, 1903, Pryor Creek, Indian Territory, was made the place for recording and filing mortgages on property located in the fifth recording District.

That subsequently to the passage and approval of the Act of Congress May 27th, 1902, it was th duty of C. M. Keys & Company and Stock Yards Bank, and of the Vinita National Bank, if they desired to preserve their liens as against subsequent mortgages, or attaching creditors to have their mortgages filed or recorded at Vinita, Indian Territory.

That subsequently to the passage and approval of the Act of Congress Approved February 19, 1903, it was the duty of C. M. Keys & Company and Stock Yards Bank, and of the Vinita National Bank, if they desired to preserve their liens as against subsequent mortgages or attaching creditors, to have their mortgages indexed at Pryor Creek, Indian Terirtory.

That no demand or request was ever made by said C. M. Keys & Company, the Stock Yards Bank, or the Vinita National Bank, upon the Clerk of the United States Court and Ex-Officio Recorder, at Muskogee, Indian Terirtory, to have their mortgages transferred to the indexes at Pryor Creek, Indian Teritrory.

That at the time of the filing of the affidavit of attachment herein, by the said First National Bank of Claremore, said Wat Mayes, defendant was about to remove a portion of his property, afterwards attached herein, outside the jurisdiction of said Court, not leav-

ing enough property therein to liquidate the claim of the various creditors.

That the grounds of attachment of the First National Bank of Claremore should be sustained.

That the land covered by the mortgages of the First National Bank of Claremore, and the First National Bank of Vinita, is of insufficient value to liquidate their, or either of their said claims.

It is the opinion of the Master in this case that the cattle fund will not be sufficient to pay all the claims involved in this case; and that the land described in the mortgages in evidence herein should be sold under orders of court and the net proceeds should be added to the cattle fund and out of the two funds so derived payment should be made as follows:

1. All costs accrued in this case.
2. The claim of the First National Bank of Vinita, which the Master finds amounts to $3,778.19.
3. The claim of the First National Bank of Claremore which *the amounts* amounts to $4,869.19.
4. The claim of the Citizens Bank of Pryor Creek which the Master finds amounts to $1,824.68 with interest.
5. The claim of J. C. Hogan, which the Master finds amounts to $6,187.00.
6. The claim of Mary D. Mayes, which the Master finds amounts to $144.00 with interest.
7. The claim of the Vinita National Bank, which the Master finds amounts to $729.04.
8. The claim of C. M. Keys & Company and Stock Yards Bank, which the Master finds amounts to $15,808.69.

THE PREMISES CONSIDERED, the Master recommends that the Court make and enter a decree herein in accordance with the findings hereinbefore set out.

The Master asks that his compensation be fixed by the Court.

Respectfully submitted,

ALBERT M. ETCHEN,

Master in Chancery."

And, on the 3d day of September, 1906, C. M. Keys & Company, and Stock Yards Bank, filed exceptions to the above Report, which can be found on pages 123 and 124, omitting the caption, which is as follows:

"EXCEPTIONS TO THE MASTER'S REPORT BY C. M. KEYS & CO., AND STOCK YARDS BANK, INTERVENERS HEREIN.

And now comes interveners, C. M. Keys & Co., and Stock Yards Bank, and except to the report of the Master filed herein on the 3*th* day of August, 1906, and say that the Master erred in his findings of fact and conclusions of law, as follows, to-wit:

FIRST, that the property described in the mortgage of these interveners is the same property described in the mortgage of the intervener, The Vinita National Bank.

SCCOND, that the Master erred in finding that these interveners made no demand upon or request of the Clerk of the United States Court and ex-Officio Recorder at Muskogee, Indian Terirtory, to have their said mortgage transferred to the indexes at Pryor Creek, Indian Territory, because there is no evidence in the record that these interveners did not make demand upon or request of said Clerk to transfer their said mortgage to the indexes at Pryor Creek, Indian Terirtory.

THIRD, the Master erred in failing to find that the attaching creditor and subsequent mortgagees had actual knowledge of the existence of the mortgage of these intervenors.

FOURTH, the Master erred in failing to find specifically that on the 31st day of October, 1901, intervener, C. M. Keys & Company, secured and fixed a superior lein and vested right in the property described in their mortgage by filing and recording the same in the office of the Clerk of the United States Court and ex-officio recorder at Muskogee, Indian Territory, as then required by law.

FIFTH, the Master erred in failing to find the

date of and the manner in which these interveners were divested of their lein on and vested right in the property described in their mortgage.

SIXTH, the Master erred in finding that subsequently to the 27th day of May, 1902, it was necessary to file or record all mortgages on property located in the Northern District of the Indian Territory, in the office of the Clerk of the United States Court, and ex-officio recorder at Vinita, Indian Territory, because the mortgage of these interveners had already been recorded at Muskogee, as required by law.

SEVENTH, the Master erred in finding that subsequently to the 27th day of May, 1902, it was the duty of these interveners if they desired to preserve their lien as against subsequent mortgages and attaching creditors to have their mortgage filed or recorded at Vinita, Indian Territory.

EIGHT, the Master erred in finding that subsequently to the 19th day of February, 1903, it was the duty of these interveners if they desired to preserve their lien as against subsequent mortgages and attaching creditors to have their mrotgage indexed at Pryor Creek.

NINTH, the Master erred in his conclusion that the mortgage of these interveners has been postponed to the lein of the attaching creditor and the lein of all other interveners herein; and he further erred in recommending the payment out of the fund arising from the sale of the cattle described in interveners' mortgage to be made as follows, to-wit: "(1) All costs accrued in this case; (2) the claim of the First National Bank of Vinita, which the Master finds amounts to $3,778.19; (3) the claim of the First National Bank of Claremore, which the Master finds amounts to $4,869.19; (4) the claim of the Citizens' Bank of Pryor Creek, which the Master finds amount to $1824.68 with interest; (5) the claim of J. C. Hogan, which the Master finds amounts to $6187.00; (6) the clai mof Mary D. Hayes, which the Master findes amounts to $1440.00 with interest; (7) the claim of the Vinita National Bank which the Master finds amounts to $729.04; (8)

the claim of C. M. Keys & Co., and the Stock Yards Bank, which the Master finds amounts to $15,808.69." because Interveners, Stock Yards, Bank, is the owner and hold —— *amount* to $1824.68, *with interest;* (5) *the claim of J. C. Hogan, er* of the prior and superior lein upon the cattle described in their said mortgage to that of the attaching creditor herein, and all liens of the other intervenors herein, and is entitled to have the fund arising from the sale of said cattle described in their said mortgage applied to the payment of their claim, and that the expenses of this litigation should be paid by the attaching creditor herein.

WHEREFORE, these interveners pray the court to sustain their exceptions to said report and to enter a final decree herein upon the facts appearing in the case and in accordance with law and equity to the end that the fund arising from the sale of said cattle be applied to the payment of their claim, and that the costs of this action be paid by the plaintiff.

And in duty bound these interveners will every pray.

NEV. CAMPBELL,
ROBERT F. BLAIR,
Solicitors for Interveners, C. M. Keys & Co. and Stocke Yards Bank."

The Vinita National Bank filed exceptions to the Master's Report, which can be found on page 125-126; and, the Court on the 7th day of January, 1907, entered a Decree, omitting th caption, which is as follows: (Pages 127 to 138.)

"DECREE.

On this 7th day of January, 1907, in open court comes on for trial and consideration the matters and things involved in the various complaints, answers and interpleas herein, and the parties in interest appear by their respective attorneys, and the report of the Master in Chancery, A. M. Etchen, on file herein, together with the evidence taken by him, and his report thereon, and the various exceptions to said report are

by the Court considered, and upon consideration of the several exceptions filed to the Master's report they are each overruled and the respective exceptors are allowed an exception to the overruling of their respective exceptions, and thereupon a trial is had and the evidence considered, and the court finds as follows:

That the defendant, Wat Mayes, on the 15th day of December, 1899, being indebted to the Vinita National Bank, made, executed and delivered to said bang his promissory note in the sum of $4,500.00, with interest thereon at the rate of ten per cent. per annum from maturity, said note to be due and payable six months after date.

That to secure said note said Wat Mayes, made, executed and delivered to said Vinita National Bank a chattel mortgage on the following described property, to-wit:

Five Hundred head of cows, two years old and upwards, branded in the following brands, to-wit: 100 branded C on right side; 100 branded —— on left thigh; 300 branded W on left shoulder; said cattle also branded with various other brands. The above described cattle being all the cows owned by party of the first part 2 years old and up. Said cattle being on defendant's ranch in Cooweescoowee District, Cherokee Nation, and within the Northern District of the Indian Territory.

That said mortgage was filed on the 29th day of December, 1899, at 2 o'clock P. M., and entered on page 113 Book 00 of Minutes of Mortgages, by James A. Winston, Clerk of the United States Court and ex-officio recorder for the Northern District of the Indian Terirtory.

That said mortgage has since been renewed by filing renewal affidavits in the office of the Clerk of the United States Court, and ex-officio recorder at Muskogee, Indian Territory, on the following dates: December 14th, 1900; December 12th, 1901; December 20th, 1902; December 14th, 1903; December 12th, 1904.

That thereafter defendant made payments on said note, and reduced the amount thereof to $729.04, which

sum is due said Vinita National Bank from said defendant, with interest from August 15, 1905.

That thereafter and on the 28th day of December, 1901, the defendant, Wat Mayes, made, executed and delivered to C. M. Keys & Company, his certain promissory note in the sum of $34,800.04, with interest thereon at the rate of 8 per cent per annum from date thereof.

That said defendant, to secure said note, made, executed and delivered to said C. M. Keys, & Co., a chattel mortgage upon the following described properry:

Six hundred (600) three year steers; six hundred (600) cows; four to eight years; one hundred forty three (143) four year steers; three hundred twenty-five (325) two year steers; one hundred (100) two year heifers; three hundred fifty (350) yearling steers and heifers; five hundred (500) last spring calves; twenty (20) bulls; five bulls coming two year old (the 20 bulls are coming four year old.) Above mentioned cattle are branded thus W on left shoulder with the exception of a few of the cows and three year steers which have ———— on right shoulder, and about twelve of the last spring calves have K on both sides. Eleven four steers branded O on left loin. Thirty five two year steers; thirty eight three year steers; fourteen two year heifers; ten four year bulls; eighty four cows three to eight years, all branded K on both sides. One Hundred forty ton— cotton seed; three hundred fifty ton— o fhay. One thousand bushels of corn; six hundred acres of shocked fodder and three hundred acres of shocked fodder rented. These cattle are located on said mortgagor's ranch three miles southeast of Pryor Creek, I. T.

That said mortgage was filed for record in the office of Charles A. Davidson, Clerk of the United States Court and Ex-Officio recorder in the Northern District of the Indian Territory, at Muskogee, Indian Territory, on the 31st day of October, 1901, at 2 o'clock P. M. and recorded in Book M, page 286.

That thereafter and before said note became due,

said C. M. Keys & Company, for avaluable consideration, sold and transferred said note to Stock Yards Bank, presentment, demand, protest and notice of protest being waived and payment at maturity guaranteed by said C. M. Keys & Company.

That thereafter said defendant made settlement with said Stock Yards Bank by payment of a portion of said note and executed and delivered his promissory note for the remainder thereof, and from time to time thereafter said defendant made various payments upon said indebtedness, and on the 1s tday of March, 1905, made, executed and delivered his promissory note as in evidence of the remaining indebtedness due said C. M. Keys & Company, in the sum of $12,026.74, together with interest thereon at the rate of seven per cent per annum from date thereof; also one certain promissory note of date January 16th, 1905, in the sum of $2970.95, payable to the order of C. M. Keys & Company, together with interest thereon at the rate of seven per cent per annum fro mdate thereof.

That thereafter, and before said notes became due for a valuable consideration, said C. M. Keys & Company endorsed, negotiated and sold to intervener Stock Yards Bank said notes, together with the mortgage heretofore described.

That there is now due and unpaid —— said indebtedness the sum of $16,679.68.

That thereafter and on the —— day of February, 1905, the exact date not being shown by the evidence, defendant, Wat Mayes, made, executed and delivered to C. M. Keys & Company his certain promissory note in the sum of $500.00, which together with interest thereon aggregates the sum of $565.63.

That all of said indebtedness as evidence— by said notes is included in and covered by said mortgage.

That on the 8th day of January, 1903, said Wat Mayes, for a valuable consideration, made, executed and delivered to the First National Bank of Claremore, Indian Territory, his certain promissory note in the sum of $4206.62, with interest thereon at the rate of eight per cent per annum from aturity, until paid.

That said note after its making was extended to January 8th, 1905.

That thereafter and on the 13th day of July, 1904, said defendant, Wat Mayes, for a valuable consideration, made, executed and delivered to the First National Bank of Claremore, Indian Territory, his certain promissory note in the sum of $356.75, with interest thereon at the rate of eight per cent per annum from maturity until paid.

That there is due said First National Bank of Claremore, Indian Territory, from the said Wat Mayes upon an account the sum of $43.55, and interest thereon at the rate of six per cent per annum from and after the 26th day of November, 1904, also the sum of $66.12 with interest thereon at the rate of six per cent per annum from and after the 5th day of June, 1905.

That on the 16th day of January, 1903, said Wat Mayes, to secure said notes, made, executed and delivered to the First National Bank of Claremore, Indian Territory, his certain mortgage on the following described lots and improvements located thereon in the town of Pryor Creek, Indian Territory, described according to the Cherokee Survey, as follows:

Lots No. 5, 6, 7, and 8, in Block No. 81; Lot No. 2 in block No. 59; Lot No. 8 in block No. 37; Lots No. 2 and 8 in block No. 66; Lot No. 12 in block No. 55; Lot No. 1, in block No. 54; the south 1-2 of Lot No. 2, Block No. 77; Lots 2 and 4 in block No. 78, Lot No. 3 in block No. 30; Lots 2 and 4 in block No. 70.

That thereafter and on the 7th day of December, 1903, at 10 A. M. said mortgage was duly filed for record in the office of J. C. Burgess, Deputy Clerk of the United States Court and ex-officio recorder, at Pryor Creek, Indian Territory, and duly recorded in Book A, page 193.

That on the 16th day of January, 1903, said defendant, Wat Mayes, made, executed and delivered to the First National Bank of Vinita, a chattel mortgage in the sum of $3,778.19, on the following described

property, located in the Northern District of the Indian Territory, to-wit:

All his cattle of every description consisting of steers, cows, heifers, calves and bulls, and being as estimated 475 4 year old steers, some branded 4 on left thigh, some running W on left shoulder; 200 coming two year old steers same brand; 430 coming yearlings mixed some branded 4 on left thigh; 85 coming two year old heifers, branded running W on left shoulder; 25 bulls; the cattle are supposed to be located about three miles south of Pryor Creek, but this mortgage covers all cattle no matter where located; cattle above described have various mortgages on them, but the exact amount of the mortgages on the respective classe sof cattle is unknown to the parties hereto, and it may be that all the cattle are not covered by mortgage, but the mortgagor does not represent that any of the cattle are free from mortgage.

That thereafter and on the 16th day of January, 1903, said mortgage was duly acknowledged, and was thereafter filed for record in the office of the Clerk of the United States Court and ex-officio recorder for the Northern District of the Indian Territory, at Vinita, Indian Territory, and was recorded in Book B, page 68, and was thereafter indexed on the first day of December, 1904, in the office of the Deputy Clerk of the United States Court and ex-officio recorder at Pryor Creek, Indian Territory.

That on the 5th day of June, 1905, said Wat Mayes to secure the payment of said notes, made, executed and delivered to the First National Bank, of Vinita, Indian Territory, his mortgage on the following described property, as shown by the Cherokee Surveys to-wit:

Lots 5, 6, 7, and 8, in block No. 81; Lot No. 2 in block No. 59; Lot No. 8 in block No. 37; Lots No. 2 and 8 in block No. 66; Lot No. 12 in block No. 55; Lot No. 1 in block No. 54; south 1-2 of Lot No. 2 in block No. 77; Lots No. 2 and 4 in block No. 78; Lot No. 3 in block No. 30; Lots No. 2 and 4 in block No. 70, in the town of Pryor Creek, Indian Territory.

That said mortgage was duly recorded in the office of J. C. Burgess, Deputy Clerk of the United States Court and ex-officio recorder on the 19th day of June, 1905, at 5 o'clock P. M., and recorded in Book C, page 528.

That on the 4th day of April, 1903, said defendant, Wat Mayes, made, executed and delivered his certain promissory note to the Citizens Bank of Pryor Creek, in the sum of $526.98, with interest thereon at the rate of 8 per cent per annum from and after October 4th, 1903.

That thereafter on the 24th day of July, 1905, said defendant, Wat Mayes, made, executed and delivered to the Citizens Bank of Pryor Creek his certain promissory note in the sum of $1297.79 with interest thereon at the rate of 8 per cent per annum from and after the 24th day of October, 1905.

That to secure the payment of said ontes said defendant, Wat Mayes, on the 24th day of July, 1905, made, executed and delivered to the said Citizens Bank of Pryor Creek his certain chattel mortgage on the following described property, located in the Northern District of the Indian Territory, to-wit:

330 head of cows from three to six years old branded W on left shoulder; forty five head same as above branded K on left side; 120 four year steers, branded W on left shoulder; 100 two year old steers branded W on left shoulder; 75 yearling steers branded W on left shoulder; 30 yearling heifers branded W on left shoulder; 60 calves branded W on left shoulder.

That thereafter and on the 24th day of July, 1905, at 9 A. M., said mortgage was duly filed in the office of J. C. Burgess, Deputy Clerk of the United States Court and Ex-Officio Recorder at Pryor Creek, Northern District of the Indian Territory.

That on the 17th day of March, 1903, said Wat Mayes, made, executed and delivered his certain promissory note in the sum of $1440.00 to Mary D. Mayes, with interest thereon at the rate of eight per cent per annum from and after November 13th, 1903.

That thereafter on the 2nd day of August, 1905,

for the purpose of securing said note, said Wat Mayes executed and delivered to said Mary D. Mayes, a chattel mortgage on the following described property, located in the Fifth Recording District of the Northern District of the Indian Territory, to-wit:

45 head of cows from three to six years old, branded K on left shoulder; 330 head of cows from three to six years old, branded W on left shoulder; 120 head of four year old steers; 100 head of two year old steers, 60 head of one year old steers; 40 head of one year old heifers; 50 head of calves, and 3 bulls, all branded W on left shoulder; and two red bulls, no brands. All of said stock is now kept on the premises and in the pastures of said grantors in said recording district.

That said mortgage was duly filed at Pryor Creek, Indian Territory, on the 3d day of August, at 4 o'clock P. M. by J. C. Burgess, Deputy Clerk of the United States Court and ex-officio recorder.

That thereafter and on the 27th day of July, 1905, said Wat Mayes, made, executed and delivered his certain promissory note to J. C. Hogan in the sum of $6,187.00 with interest thereon at the rate of eight per cent per annum from date thereof.

That on the 27th day of July, 1905, said defendant, Wat Mayes, for the purpose of securing the payment of said note, made, executed and delivered to the said J. C. Hogan, his chattel mortgage, upon the property seized under the writ of attachment herein.

That thereafter on the 28th day of July, 1903, said mortgage was duly filed for record in the office of the Clerk of the United States Court and ex-officio recorder for the Northern District of the Indian Territory, at Pryor Creek.

That on the 20th day of July, 1905, plaintiff caused a writ of attachment to issue out of the United States Court at Vinita, Indian Territory, upon certain property of the defendant; and that the United States Marshal for the Northern District of the Indian Territory, took into his possession under said writ the following described property, to-wit:

262 cows branded W on left shoulder; 45 black

cows, branded K on left side; 102 four year old steers branded W on left shoulder*ed;* 98 2 year old steers branded W on left shoulder; 35 1 year old steers branded W on left shoulder; 39 1 year old heifers branded W on left shoulder; 7 bulls branded W on left shoulder; 60 calves bra-ded W on left shoulder.

That said property taken under and by virtue of said order of attachment is the same property as was included within and covered by said several mortgages executed by said defendant to said plaintiff and the various interveners herein.

That said order of attachment was also personally served on the defendant, Wat Mayes, at Pryor Creek, Indian Territory, on the 22nd day of July, 1905.

Thereafter and on the 23rd day of August, 1905, George W. Mayes was by order of the court, duly appointed receiver with authority to take charge of the property attached in said action.

That thereafter and on various dates, the property taken under said attachment was duly sold in accordance with the orders of court, and that there was realized from said sale the sum of $11,234.47.

The law with reference to recording and filing mortgages applicable to this case, are as follows:

Chapter 145 U. S. Statutes at Large, Approved March 1st, is in part as follows:

"The Northern District shall consist of all the Creek country, all of the Seminole country, all of the Cherokee country, all of the country occupied by the Indian Tribes of the Quapaw Indian Agency and the townsite of the Miamia Townsite Company, and the places of holding courts in said Districts shall be at Vinita, Miami, Tahlequah and Muskogee."

Chapter 182 U. S. Statutes at Large, Approved May 2nd, 1890, is in part as follows:

"They (the clerk and deputy clerks of the United States Court shall also be ex-officio recorders within their respective divisions, and as such they shall perform such duties as are required of recorders of deeds under the said laws of Arkansas, and receive the fees

and compensation therefor which are provided in said laws of Arkansas for like service."

Mansfield's Digest, Section 4724 provides as follows:

"All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded if for lands, in the county or counties in which the lands lie, and if for personal property, in the county in which the mortgagor resides."

Chapter 136 U. S. Statutes at Large, Approved February 3d, 1897, is in part as follows:

"That Section 4742 of Mansfield's Digest of the Laws of Arkansas heretofore put in force in the Indian Territory is hereby amended by adding to said section the following: "Provided, That if the mortgagor is a non-resident of the Indian Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed."

Chapter 888 U. S. Statutes at Large Approved May 27th, 1902, is in part as follows:

"That the Clerk's office at Vinita shall also be the recording officer for the Northern District."

Chapter 707 U. S. Statutes at Large, Approved February 19th, 1903, is in part as follows:

"That Chapter 27 of the Digest of the Statutes of Arkansas known as Mansfield's Digest of eighteen hundred and eighty four, is hereby extended to the Indian Territory, so far as the same may be applicable and not inconsistent with any laws of Congress: Provided that —he Clerk or Deputy Clerk of the United States Court of each of the courts of said Territory, shall be ex-officio recorder for his district and perform the duties required of recorder in the chapter aforesaid, and use the seal of such court in cases requiring a seal and keep the records of such office at the office of said clerk or deputy."

Chapter 707 U. S. Statutes at Large, Approved February 19th, 1903, is in part as follows:

"It shall be the duty of each clerk or deputy clerk of such court to record in the books provided for his office all deeds, mortgages, deeds in trust, bonds, leases, covenants, defeasences, bills of sale and other instruments of writing of or concerning lands, tenements, good or chattels; and where said instruments are for a period of time limited on the face of the instruments they shall be filed and indexed, if desired by the holder thereof, and such filing for the period of twelve months from the filing thereof, shall have the same effect in law as if recorded at length."

Chapter 707 U. S. Statutes at Large, approved February 19th, 1903, is in part as follows:

"All instruments of writing the filing of which is provided for by law shall be recorded or filed in the office of the clerk or deputy clerk at the place of holding court in the recording district where said property may be located, and which said recording districts are bounded as follows:

* * * * * * * * * * * * * * * * *

District numbered five beginning at a point on the Eastern boundary line of the Indian Territory where same is crossed by the Township line between townships twenty-three and twenty-four north; thence south along said Eastern boundary line to the township line between townships nineteen and twenty north; thence west on said township line to the range line b-tween ranges seventeen and eighteen east; thence north on said range line tothe township line between townships twenty-three and twenty-four; thence east on said township line to the place of beginning. The place of record for District numbered five shall be at Pryor Creek."

Chapter 707 U. S. Statutes at Large, Approved February 19th, 1903, is in part as follows:

"Such instruments heretofore recorded with the Clerk of any United States Court in the Indian Territory shall not be required to be again recorded under this provision, but shall be transferred to the indexes

without further cost, and such records heretofore made shall be of full force and effect, the same as if made under this statute."

That all of said property covered by said mortgage was at the date of the execution of said mortgages by said Wat Mayes to the various mortgagees herein, within what now comprises recording district numbered five.

That prior to the 27th day of May, 1902, all mortgages executed by defendant Wat Mayes to the various mortgages heretofore named herein were properly filed or recorded at Muskogee, Indian Trritory.

That subsequently to the 27th day of May, 1902, by the Act of Congress approved on said day, making Vinita, Indian Territory, a place for filing and recording mortgages on property located in the Northern District of the Indian Territory, it was necessary to file or record all mortgages with the clerk of the United States Court and ex-officio recorder at Vinita, Indian Territory.

That thereafter by the Act of Congress approved February 19th, 1903, Pryor Creek, Indian Territory, was made the place for recording and filing mortgages on property located in the fifth recording district.

That subsequently to the passage and approval of the Act of Congress Approved February 19, 1903, it was the duty of C. M. Keys & Company and Stock Yards Bank, and of the Vinita National Bank, if they desired to preserve their liens as against subsequent mortgages or attaching creditors, to have their mortgages indexed at Pryor Creek, Indian Territory.

That no demand or request was ever made by said C. M. Keys & Company, the Stock Yards Bank, or the Vinita National Bank, upon the Clerk of the United States Court and ex-officio recorder at Muskogee, Indian Territory, to have their mortgages transferred to the indexes at Pryor Creek, Indian Territory.

That the mortgage of C. M. Keys & Company is an absolute fraud, by reason of their fa-lure to renew or to advise people in any way, shape or form of the

various payments that had been made and the transfers that had been made.

That at the time of the filing of the affidavits of attachment herein, by the First National Bank of Claremore, said Wat Mayes, defendant, was about to remove a portion of his property, afterwards attached herein, outside the jurisdiction of said court, not leaving enough property therein to liquidate the claims of the various creditors.

That the grounds of attachment of the First National Bank of Claremore should be sustained.

That the land covered by the mortgages of the First National Bank of Claremore, and the First National Bank of Vinita is of insufficient value to liquidate their, or either of their said claims.

It is the opinion of the Court in this case that the cattle fund will not be sufficient to pay all the claims involved in this case; and that the land described in the mortgages in evidence herein should be sold under orders of Court and the net proceeds should be added to the fattle fund and out of the two funds so derived payments should be made as follows:

1. All costs accrued in this case.
2. The claim of the First National Bank of Vinita, which the court finds amounts to $4,144.42.
3. The claim of the First National Bank of Claremore, which the court finds amounts to $5,413.99.
4. The claim of the Citizens Bank of Pryor Creek, which the court finds am-unts to $3,083.33.
5. The claim of J. C. Hogan, which the court finds amounts to $6,801.96.
6. The clai mof Mary D. Mayes, which the court finds amounts to $1,802.88.
7. The claim of the Vinita National Bank, which the court finds amounts to $809.77.
8. The claim of C. M. Keys & Company, and said Stock Yards Bank, which the court finds amounts to $17,245.31.

That on submission of the exceptions to the Master's Report the parties filed stipulation, and the court finds on said stipulation that all the subsequent mort-

gages and attaching creditors, except Mary D. Mayes, had actual knowledge of the mortgage of intervener, C. M. Keys & Company.

It is therefore considered, ordered and adjudged, that the attachment herein shall be sustained, and that plaintiff, First National Bank of Claremore, do have and recover of and from the defendant, WatMayes, said sum of $5,413.99, and all its costs laid out and expended, to be taxed by the clerk; this judgment to draw six per cent. interest per year from date.

It is further considered, ordered and adjudged, that intervener, First National Bank of Vinita, do have and recover of and from the defendant, Wat Mayes, said sum of $4,144,42, and all its costs laid out and expended, to be taxed by the clerk; this judgment to draw six per cent. interest per year from date.

It is further considered, ordered and adjudged, that in-tervener Citizens Bank of Pryor Creek, do have and recover of and from the defendant, Wat Mayes said sum of $2,083.33 and all its costs laid out and expended, to be taxed by the clerk; this judgment to draw six per cent. interest per year from date.

It is further considered, ordered and adjudged, that intervener J. C. Hogan, do have and recover of and from the defendant, Wat Mayes, said sum of $6,-801.96; and all his costs laid out and expended, to be taxed by the clerk; this judgment to draw six per cent. interest per year from date.

It is further considered, ordered and adjudged, that intervener Mary D. Mayes, do have and recover of and from the defendant, Wat Mayes, said sum of $1,802.88, and all her costs laid out and expended; to be taxed by the clerk; this judgment to draw six per cent interest per year from date.

It is further considered, ordered and adjudged, that intervener, Vinita National Bank do have and recover of and from the defendant, Wat Myaes, said sum of $809.77, and all its costs laid out and expended, to be taxed by the clerk; this judgment to draw six per cent interest per year from date.

It is further considered, ordered and adjudged,

that intervener, C. M. Keys & Company, and Stock Yards Bank, do have and recover of and from the defendant, Wat Mayes, said sum of $17,245.31, and all their costs laid out and expended, to be taxed by the clerk; this judgment to draw six per cent interest per year from date.

It is further considered, ordered and adjudged, that out of the moneys on hand from the sale of the cattle there be paid by the receiver all costs herein, including a Master's fee to A. M. Etchen of $350.00, and that out of the remainder he pay the respective claims of the parties herein in full as far as the proceeds will extend in the following order:

1. First National Bank of Vinita, its claim, amounting to $4,144.12.

2. To First National Bank of Claremore, its claim, amounting to $5,413.99.

3. To Citizens Bank of Pryor Creek, its claim, amounting to $2,083.33.

4. To J. C. Hogan, his claim, amounting to $6,-801.96.

5. To Mary D. Mayes, her claim, amounting to $1,802.77.

6. To Vinita National Bank, its claim, amounting to $809.77.

7. To C. M. Keys & Company and Stock Yards Bank, their claim, amounting to $17,245.31.

It further appearing that the moneys in the hands of the receiver is not sufficient to meet the claims of all the creditors, and that by reason of the payments to First National Bank of Vinita, and First National Bank of Claremore, the remaining creditors of Wat Mayes have not realized the amounts due them.

It is ordered and adjudged, that the property mortgaged to them, viz:

Lots No. 5, 6, 7 and 8 in block No. 81; Lot No. 2 in block No. 59; Lot No. 8 in block No. 37; Lots No. 2 and 8 in block No. 66; Lot No. 12 in block No. 55; Lot No. 1 in block No. 54; the south 1-2 of Lot No. 2, block No. 77; Lots 2 and 4 in block No. 78; Lot No. 3 in block No. 30; Lots 2 and 4 in block No. 70, in the town of

Pryor Creek, Indian Territory, together with all improvements thereon, said lots being described according to the Cherokee Surveys, be sold at public auction at the court house door between the hours of nine o'clock in the forenoon, and three o'clock in the afternoon, in the town of Vinita, Indian Territory, after advertisement for not less than twenty days next before the day of sale by posting at least twenty printed notices of sale in separate public places in the North ern District of the Indian Territory, one of which shall be at the court house door in Vinita, and one of which shall be posted on each of the lots in question, and by publishing same for at least two insertions in some weekly newspaper published in the Northern District of the Indian Territory.

It is further ordered and adjudged, that the sale shall be to the highest and best bidder on a credit of four months, the purchaser to execute bond with good security, to be approved by the commissioner appointed to make the sale, a lien to be retained on the property sold for the satisfaction of the purchase price, and the bond to have the force of a judgment.

It is further ordered, that the sale be reported for confirmation and that when the money derived from the sale is paid into court it be applied, in the order of priority heretofore set out to the satisfaction of the judgments remaining unsatisfied after the distribution of the money in the hands of the receiver; and the receiver, George W. Mayes, is appointed Commissioner to make the sale.

To the rendition of this judgment and to each finding of fact and conclusions of law, each of the parties hereto are allowed an exception.

JOSEPH A. GILL,
Judge of the United States Court, in and for the Northern District of the Indian Territory."

On the 4th day of February, 1907, an order was made to pay certain expenses; on the 2d day of February, 1907, an appeal was allowed C. M. Keys & Com-

pany and Stock Yards Bank from this decree, page 139; and assignment of errors was made, which can be found on page 140 and 141, down to page 142.

This appeal was pending at the time of the admission of the State of Oklahoma into the union; and thereafter the Supreme Court of Oklahoma took jurisdiction of the case; and on the 11th day of December, 1909, a mandate of reversal went from the Supreme Court to the District Court of Craig County, Oklahoma, which omitting the caption, is as follows:

"TO THE HONORABLE JUDGE OF THE DISTRICT COURT OF CRAIG COUNTY, IN SAID STATE OF OKLAHOMA:

Whereas, the Supreme Court of the State of Oklahoma, did at the September 1908 term thereof, on the 10th day of September, 1908, render an opinion in the above entitled case, appealed from the United States Court of Northern District of the Indian Territory, at Vinita, modifying the judgment of the lower court; and directing that claims be paid in the order of their respective dates, viz:

FIRST: The Vinita National Bank; Second, C. M. Keys & Company and Stock Yards Bank; the other creditors taking their places after the Vinita National Bank and C. M. Keys and Company and Stock Yards Bank for the amounts and in the order decreed by the court below; and thereafter on November the 11th, 1908, petition for rehearing was granted in the above entitled cause; and on September 14, 1909, opinion was rendered by the Court in the above cause On Rehearing; adhering to the former opinion rendered herein on September the 10th, 1908, except the ruling of the court below on the question of the validity of the chattel mortgages held by C. M. Keys and Company or their assigns, and Vinita National Bank, and the decree of the court below is only distributed in so far as

it is based upon the court's findings that these chattel mortgages were void as against subsequent creditors or incumbrancers.

NOW, THEREFORE, you are commanded to take such further proceedings herein as shall accord with said opinion of the Supreme Court and right and justice.

Witness, the Honorable M. J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma, at the City of Guthrie, this 9th day of December, 1909.

(Signed) W. H. L. CAMPBELL, Clerk,
(Seal) By W. M. Bonner, Deputy."

The syllabus accompanying the mandate of reversal can be found on page 144, omitting the caption of the case, is as follows:

"SYLLABUS.

1. Where a chattel mortgage was filed or recorded at Muskogee, in the Northern District of the Indian Territory, which was the proper place of recordation at the time thereof, and by a subsequent Act of Congress the Northern District was sub-divided, and Vinita made the recording office for the part of the Northern District in which the property mortgaged was situated, such change did not affect the validity of such recordation.

2. The record of a chattel mortgage, in a district where the property covered thereby lies, though upon subdivision of the district subsequent to the record of the mortgage the property may fall within the new district, is notice to purchasers or incumbrancers.

3. That part of the Act of Congress providing for the record of deeds and other conveyances and instruments of writing in the Indian Territory, which provides that, "such instruments heretofore recorded with the Clerk of the United States Court of the Indian Territory shall not be required to be again recorded under this provision, but shall be transferred to the indexes without further cost, and such record heretofore made shall be of full force and effect, the same as if made

under this statute," casts no additional duties upon mortgagees who, prior to its passage, had filed or recorded their instruments in conformity with the recordation laws then in force.

Appeal from the United States Court for the Northern District sitting at Vinita, Indian Territory. Modified."

On the 10th day of March, 1910, application was made by the plaintiff, First National Bank of Clarebore, for leave to file an amended answer to the plea of intervention. This application can be found on page 145, and omitting the caption, as as follows:

"APPLICATION OF FIRST NATIONAL BANK FOR LEAVE TO FILE AMENDED ANSWER THE PLEA OF INTERVENTION OF C. M. KEYS & CO., and Stock Yards Bank.

The plaintiff represents and shows to the court that this cause originated in the United States Court in the Indian Territory, Northern District, sitting at Vinita, and that said cause resulted in a judgment in favor of the plaintiff and against the interveners, C. M. Keys & Co., and Ctock Yards Bank. That said cause came to the Supreme Court of the State of Oklahoma, as the successor of the United States Court of appeals in the Indian Territory, and that the cause has been reversed by the Supreme Court of the State of Oklahoma, and remanded for new trial. That in its former answer to the interplea it plead, setting up, as it was advised, by its denial the invalidity of the mortgage relied upon by C. M. Keys & Co. and by Stock Yards Bank. That it appears from the opinion of the Supreme Court of the State of Oklahoma that said Court did not deem the former answer sufficiently specific to set up fraud in the mortgage relied upon by the interveners. That this plaintiff is advised and charges that actual fraud exists and did exist at all times after the recording of said mortgage arising from the fact that the mortgagor after the recording of

said mortgage was permitted to deal with the property as his own without reference tothe mortgage, to the hindrance and delay of his other creditors, and this plaintiff was of the opinion that this matter was sufficiently pled in the former proceeding, but the plaintiff now being advised that the Supreme Court of Oklahoma does not so hold it asks permission of this Court to file an amended answer to said interplea setting up the facts in the matter as this plaintiff is advised they exist, and this plaintiff herewith tenders to the court the amended pleading it desires to file.

(Signed): FIRST NATIONAL BANK,
OF CLAREMORE

(Signed): By W. H. Kornegay,
Attorney."

Along with the application an amended answer was tendered, which can be found on pages 147 to 149; omitting the caption, and is as follows:

"AMENDED ANSWER OF FIRST NATIONAL BANK OF CLAREMORE TO INTERPLEA OF C. M. KEYS & CO., and to INTERPLEA OF STOCK YARDS BANK.

The plaintiff, First National Bank of Claremore, for amended answer to the interplea of C. M. Keys & Co., a partnership composed of C. M. Keys and Hugh Mills, and to the Interplea of the Stock Yards Bank repeats and avers, in the language of its original answer herein, and says:

I.

That it has not sufficient knowledge or information to form a belief as to whether or not the defendant, Wat Mayes, is indebted in any manner to the interpleader, and it has not sufficient knowledge or information to form a belief as to whether or not the defendant, Wat Mayes executed any not tothe interpleader, or whether the interpleader holds any note executed by him and it says it has not sufficient knowledge o rinformation to form a belief as to whether or not

the interpleader holds any mortgage executed by Wat Mayes or anyone else upon the property attached in this case. Neither has it sufficient knowledge or information to form a belief as to whether any mortgage so executed was recorded or filed for record at any place. It therefore denies that the interpleader herein holds any note or mortgage executed by Wat Mayes, and it therefore denies that the interpleader herein has any lien for any sum upon the property attached in this case, and it prays for judgment for its costs.

II.

The plaintiff herein, by way of supplement and addition to the answer heretofore filed to said interplea, says, that it is advised as a result of the evidence introduced in this case, that at one time in the month of October, 1901, the defendant, Wat Mayes, did, execute and make to C. M. Keys & Co., one of the interveners, a chattel mortgage, which said chattel mortgage is set out as an exhibit to the interplea of C. M. Keys & Co., and Stock Yards Bank, but the plaintiff avers that said mortgage was not acknowledged in the manner required by the laws of the United States at said time; and the plaintiff further says that said mortgage on its face was fraudulent and void, and was against the laws of the United States, and the public policy of the United States as shown by the decisions of its courts, and by its statutes in force in the Indian Territory at said time. That said mortgage at no time became of record and constructive notice to subsequent purchasers or creditors of the defendant, Wat Mayes under the laws of the United States in force in the Indian Territory prior to the admission of the State of Oklahoma into the Union. That under the laws of the United States in force in the Indian Territory it became and was the duty of the mortgagee in said mortgage to have the same recorded in the office of the United States Clerk for the Northern District of the Indian Territory, at Vinita and ex-officio recorder for the Northern District thereof, from and after July 2, 1902, if it desired to preserve a lien upon the property described in said mortgage as against the claims of

creditors and subsequent purchasers. That it also became and was the duty of the mortgagee under the laws of the United States, if it desired to claim a lien upon said property to have said mortgage recorded in the office of the Clerk of the United States Court for the Northern District of the Indian Territory, at Pryor Creek, and ex-officio recorder for the fifth recording District thereof, from and after the 19th day of February, 1903, or, in lieu thereof, to have the same indexed at said place. That at all times from and after the making of the mortgage referred to above the maker of said mortgage resided two and one-half miles southeast of Pryor Creek, in the Cherokee Nation, and all cattle owned by him were located in that immediate vicinity and within the limits of what was, by the Act of Congress of February, 1903, described and founded as the Fifth Recording District of the Indian Territory and the maker of said mortgage at all times from and after the making thereof has resided in the area described as the Fifth Recording district in said Act. That on the face of said mortgage it was due on the 27th day of November, 1901, and that after the maturity of said mortgage neither the mortgagee nor its assigns at any time took any steps whatever to foreclose the same or take possession of the property or to inform subsequent purchasers or creditors of the existence and non-payment of the supposed mortgage, but, on the contrary, did permit mortgagor therein to dispose of a large part of the property *m-mortgaged* and from time to time did permit the mortgagor to dispose of the mortgaged property for his own use and to mingle other property therewith without keeping any account whatever of the property embraced in the supposed mortgage, and did permit the mortgagor therein to dispose of a large part of the property embraced in said mortgage for his own use and benefit, to the detriment and loss of his other creditors. That the mortgagee in said mortgage during all said times has used the said mortgage, if it still exists, for the purpose of hindering and delaying the creditors of the mortgagor therein. That from time to time the mort-

gagor in said mortgage has shipped cattle and delivered property to the mortgagee in said mortgage more than sufficient to pay the amount thereof with all legal interest in the sum of at least ten thousand dollars, which should have ben applied to its liquidation, if it existed, and that the said mortgage, if it ever existed, has been fully paid and discharged. That none of the cattle attached in this case are embraced in said mortgage.

That said mortgage is now barred by the Statute of Limitations in such case made and provided under the laws of the United States.

III.

The plaintiff further shows to the Court that at the instance of Vinita National Bank the lots embraced in the mortgage made toplaintiff and to the intervener. First National Bank of Vinita were sold and the proceeds marshalled, and that the claim of the plaintiff was paid out of the fund in the hands of the Receiver. which consisted of the amount derived from the sale of the cattle and also the amount derived from the sale of the lots, and its prays for judgment in accordance with the original decree herein.

(Signed) FIRST NATIONAL BANK
OF CLAREMORE.

(Signed) By W. H. Kornegay,
Attorney."

State of Oklahoma, County of Craig, ss.

I, W. H. Kornegay, on oath do say that I am attorney for the plaintiff, and I believe the statements of the foregoing are true.

W. H. KORNEGAY.

Subscribed and sworn to before me this 10th day of March, 1910.

(Signed) Carl F. Croninger,
(Seal) Notary Public."

At the same time the intervener, First National Bank of Vinita, asked for leave to file an answer to the interplea of the interpleaders, C. M. Keys & Com-

pany and Stock Yards Bank, and tendered an answer, which can be found at pages 149 and 150; omitting the caption, is as follows:

"ANSWER OF FIRST NATIONAL BANK OF VINITA TO THE INTERPLEA OF C. M. KEYS & CO., AND Stock Yards Bank.

First National Bank of Vinita, by way of answer to the interplea of C. M. Keys & Company, and Stock Yards Bank, says:

I.

That it denies that the interveners, C. M. Keys & Co. and Stock Yards Bank are the owners or holders of any of the cattle attached in this case, and it says further if there ever was a mortgage executed by Wat Mayes to C. M. Keys & Co., as claimed in the interplea the said mortgage on its face was void and fraudulent under the laws of the United States, and said mortgage was not recorded in the manner prescribed by the laws of the United States, and did not become notice to anyone by virtue of its acknowledgment and recording, and said mortgage, if it ever existed, has been fully paid by the mortgagor herein by way of shipment of cattle and other property at various times to the mortgagee therein, and said mortgage became fraudulent and void as against this intervener for the reason that said mortgage was never recorded in the office of the United States Clerk for the Northern District of the Indian Territory, at Vinita, as required by the laws of the United States, and said mortgage was never recorded or indexed in the office of the Clerk of the United States Court for the Northern District of the Indian Territory, at Pryor Creek, as required by the laws of the United States, and that during the time said mortgage existed, if it existed at all, the cattle embraced therein were located in what was afterwards described as the Fifth Recording District of the Indian Territory, and the mortgagor resided in said District and about two and one-half miles southeast of Pryor Creek, Indian Territory. That said mortgagee per-

mitted the mortgagor after the making of said mortgage to dispose of the property embraced therein regardless of the terms of said mortgage and to apply the proceeds to his own use, and that said mortgage is now barred by the statutes of Limitations in such case made and provided under the laws of the United States and that none of the cattle embraced in the mortgage set up by the interveners, C. M. Keys & Co. and Stock Yards Bank are identical with the cattle attached in this case, and that the mortgage relied upon by C. M. Keys & Co. and Stock Yards Bank under the laws of the United States was fraudulent and void as against this intervener.

II.

This intervener shows to the court that at the instance of Vinita National Bank the lots embraced in the mortgage made to this Bank were sold and the proceeds marshalled, and that the claim of this Bank was paid out of the fund in the hands of the Receiver*m* which consisted of the amount derived from the sale of the cattle and also the amount derived from the sale of the lots, and it prays for judgment in accordance with the original decree herein.

FIRST NATIONAL BANK OF VINITA.
By W. H. Kornegay, Atty.

State of Oklahoma, County of Craig, ss:

I, Oliver Bagby, on oath do say. That I am president of intervener, First National Bank of Vinita, and that I believe the statements of the foregoing are true.

OLIVER BAGBY.

Subscribed and sworn to before me this 10th day of March, 1910.

(Signed) FRANK M. COLLINS,
(Seal) Notary Public."

My commission expires Jan. 4, 1914.

The Citizens Bank on the 2d day of April, 1910, made application for permission to file an answer to the interplea of Stock Yards Bank and C. M. Keys &

Company, which can be found on pages 151 and 152, omitting the caption, which as as follows:

"APPLICATION OF CITIZENS BANK, INTERVENER, FOR PERMISSION TO FILE ANSWER TO THE INTERPLEA OF C. M. KEYS, & COMPANY AND STOCK YARDS BANK.

Comes now the Citizens Bank and respectfully shows to the court that this case originated and was tried in the United States Court for the Northern District of the Indian Territory, wherein judgment was rendered for the plaintiff and against the defendant, and fixed the order in which the several interveners came to participate in the funds involved in this controversy, *and* which said order this intervener was made senior to that of the C. M. Keys & Co. and Stock Yards Bank, and that the appeal was taken to the United States Court of Appeals for Indian Territory, where the same was pending at the admission of the State of Oklahoma into the Union, and by virtue of the Enabling Act and the Constitution of the State of Oklahoma, the said cause went to the Supreme Court of the State of Oklahoma, where the lower court was reversed and the case is now remanded to this court for new trial.

This intervener states that the trial court in the former trial of this case, held and found that because the interveners, C. M. Keys & Co. and Stock Yards Bank did not record the mortgage claimed under by them in the office of the Clerk of the United States Court for the Northern District of the Indian Territory, and did not record or index the same in the office of the Clerk of the United States court for the Northern District of the Indian Territory, at Pryor Creek. that the mortgage claimed under by them was junior to the mortgage claimed under by this intervener.

That said trial court further found as a matter of fact and held, that the mortgage claimed under by the said C. M. Keys & Co. and Stock Yards Bank was fraudulent and void.

That in the opinio nrendered in this case by the

Supreme Court o fthe State of Oklahoma, the said court has held that the question of actual fraud was not raised in the trial court, and was not sufficiently pled and this intervener now charges that there was actual fraud and constructive fraud in the mortgage claimed under by C. M. Keys & Co. and Stock Yards Bank.

That the mortgagor, Wat Mayes, by and with the knowledge and consent of the mortgagee, C. M. Keys & Co. and their assignee, Stock Yards Bank, was permitted to use and dispose of the property covered by the mortgagee for his own use and benefit without accounting for the proceeds thereof, and this intervener prays this Honorable Court that it be permitted at this time to file its answer to the interplea of said C. M. Keys & Co. and Stock Yards Bank, and it herewith tenders said answer for filing.

(Signed) CITIZENS BANK,
By J. H. Langley,
Attroney for Intervener Citizens Bank."

And, the answer tendered with said application, can be found on pages 152 and 153 and 154; omitting the caption, and is as follows:

"ANSWER OF CITIZENS BANK TO INTERPLEA OF C. M. KEYS & COMPANY AND STOCK YARDS BANK.

I.

Comes now the Citizens Bank, and respectfully represents and shows to the court, that in this cause, the plaintiff First National Bank of Claremore, filed its suit and affidavit for attachment against Wat Mayes, the defendant, in the United States Court for the Northern District of the Indian Territory, and thereupon procured a writ of attachment, and by virtue of which levy was made upon a large number of cattle. That thereafter, C. M. Keys & Company and Stock Yards Bank filed their interplea in said suit, claiming an interest in the subject matter of said suit, by vir-

tue of a mortgage executed by the said Wat Mayes to the said C. M. Keys & Company, on the 28th day of October, 1901. That after the institution of said suit, the said Wat Mayes, executed to this intervener a mortgage upon the cattle taken under said writ of attachment, and by virtue of which said mortgage it claimed an interest in the subject matter of this suit, and filed its intervention. This intervener further states and shows to the court that at the date of the execution of the supposed mortgage to the said C. M. Keys & Company, and at all times thereafter, the said mortgagor resided, and the said cattle were located within that portion of the Northern District of the Indian Territory, which by the Act of Congress of February 19, 1903, was described and designated as the fifth recording district of the Indian Territory.

That by the terms of said Act and by the laws of the United States of America, then in force in Indian Territory, a chattel mortgage in order to become a lien upon property must have ben filed or recorded at the office of the Clerk of the United States Court at the place of holding court within the particular recording district within which said property was located. That the mortgage claimed under by the said C. M. Keys & Company, and its assigns, Stock Yards Bank was recorded upon the —— day of October, 1901, in the office of the Clerk of the United States Court for the then Northern District of Indian Territory, at Muskogee. That thereafter, to-wit: on the 2d day of July, 1902, the Northern District of the Indian Territory was divided and that part thereof within which the city of Muskogee was situate was created and made the Western District of the Indian Territory, and Vinita was made the place for the office of the Clerk of the United States Court for the Northern District of the Indian Territory, and was by the laws of the United States then in force in the Indian Territory, made the place for filing or recording mortgages intending to operate as a conveyance of or a lien upon property, situate within the Northern District.

That thereafter, to-wit, on the 19th day of February, 1903, the Indian Territory, was by an Act of Congress divided into Recording District, within each of which said recording Districts were located and established a place for holding terms of the United States Court therein, and a deputy Clerk of the United States Court within and for the several recording Districts were made ex-officio recorders, and the laws of the United States then in force in the Indian Territory, required that an instrument of writing intending to operate as a lien upon or a conveyance of property should be filed or recorded with the Deputy Clerk of the United States Court within the Recording District within which the property was located; and if a mortgage was of record at the time of the passage of the Act last mentioned above, that the same did not again have to be re-recorded under the provisions of that Act, but must be transferred to the indexes of the office of the Deputy Clerk of the United States Court for the proper district, to-wit: the district within which the property was situate. That the property involved in this controversy was as aforesaid at all times from and after the execution of the supposed mortgage to the said C. M. Keys & Company situated in what, after the passage of the Recording Act aforesaid, became the fifth recording District and within which said district the said mortgagor has at all times since the execution of the said C. M. Keys & Company's supposed mortgage resided, and the place of holding Court within which said district was at Pryor Creek.

II.

This intervener further alleges that the supposed mortgage of the said C. M. Keys & Company is fraudulent and void, and was fraudulent and void from and after its supposed execution and was in violation of the laws of the United States then in force in the Indian Territory, and was against public policy.

III.

That said supposed mortgage claimed under by the said C. M. Keys & Company and its assignee, Stock Yards Bank, was, at the time of their intervention in

this suit, barred by the Statute of Limitations the same having been executed in October, 1901, as aforesaid, and the note secured by said mortgage, as shown by the said mortgage having become due on the —— day of November, 1901, and the intervention of the said C. M. Keys & Company, and its assigns, Stock Yards Bank, not having been made herein until the —— day of July, 1905. That from, and at all time after the date of the execution of said C. M. Keys & Company mortgage, the said mortgagor, Wat Mayes, was permitted to remain in possession of the property covered by said mortgage.

IV.

This intervener further shows to the court, that the said mortgagor, Wat Mayes, was permitted by his said mortgagee, C. M. Keys & Company, and its assignee, Stock Yards Bank, to remain in possession of said property at all times from and after the execution of the said C. M. Keys & Company mortgage, and was permitted by the said mortgagees to hold himself out to the world as the owner of said property, and the said mortgagor by and with the consent of his said mortgagees, C. M. Keys & Company, sell and dispose of the property covered by said mortgage for the use and benefit of him, the said mortgagor, Wat Mayes, to the hindrance and delay of the other creditors of the said mortgagor. That the said mortgagor, did in truth and in fact, ship to the said C. M. Keys & Company and turn over to them several thousand dollars' worth of cattle covered by said mortgage, and did so ship and turn over to the said C. M. Keys & Company several thousand dollars of said cattle more than necessary to fully pay off and discharge the indebtedness secured by said mortgage.

Wherefore, This intervener prays the judgment of the court that the said mortgage to the said C. M. Keys & Company was fraudulent and void, and against public policy. That the debt secured by said mortgage has been fully paid, and that by reason of the said mortgagee, C. M. Keys & Company, and its assigns,

Stock Yards Bank, permitting and allowing the said mortgagor, Wat Mayes, to handle and dispose of the property covered by said mortgage for his own benefit, the same became as to subsequent creditors and encumbrances, and as to this intervener, fraudulent and void.

(Signed) J. H. LANGLEY,
Attorney for Intervener Citizens Bank.

State of Oklahoma, County of Mayes, ss:

The undersigned, E. M. Bowers, states upon his oath that he is Cashier of the Intervening Bank above named; that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true, as he verily believes.

(Signed) E. M. BOWERS, Cashier.

Subscribed and sworn to before me on this 9 day of March, 1910.

(Signed) L. F. DOTSON,
(Seal) Notary Public."

J. C. Hogan filed a similar application, and a simliar answer, which can be found at pages 155, 156, 157, 158 and 159.

The First National Bank of Claremore asked leave to file an answer to the interplea of J. C. Hogan, on page 163; and likewise it asked for leave to file an amended answer to the interplea of Citizens Bank, page 164; and for leave to file an amended answer to the interplea of the Vinita National Bank, page 155 and 156.

While the case was pending in the Supreme Court, an application was made by the First National Bank of Vinita, and by First National Bank of Claremore to the Supreme Court to pronounce judgment, which

request can be found on page 168; omitting the caption, which is as follows:

"REQUEST THAT THE COURT PRONOUNCE FINAL JUDGMENT.

The First National Bank of Claremore and the First National Bank of Vinita in each of the above appeals, which have been consolidated, ask the Court, in view of the fact that this was an equity case pending on appeal in the United States Court of Appeals in the Indian Territory at the time of the admission of the State of Oklahoma into the Union, to render a final decree herein, and they ask the Court upon the record herein not to remand the case to the District Court of Craig County, the successor of the United States Court, at Vinita; and they further ask the Court in the decree to specifically distribute the funds derived from the sale of the cattle and also from the town lots involved in this case.

FIRST NATIONAL BANK OF CLAREMORE,
FIRST NATIONAL BANK OF VINITA,
By W. H. Kornegay, Attorney."

A similar request was made by Citizens Bank, J. C. Hogan and Mary D. Mayes, and the Supreme Court denied the request on the 18th day of October, 1909. which can be found on page 169.

At page 170 can be found the record showing that C. M. Keys & Company and Stock Yards Bank, objected to the offer made by the First National Bank of Claremore, and First National Bank of Vinita to amend their pleadings, and this was sustained by the District Court; and the same thing happened with reference to Hogan, and Citizens Bank.

There was before the lower Court a certified copy

of the application for the pronouncing of final judgment made by the Supreme Court and its judgment thereon, see page 168. The opinion of the Supreme Court itself was introduced in evidence before the District Court of Craig County, and can be found on pages 172, 173, 174, 175, 176, 177, 178, and 179. The opinion on the re-hearing can be found on page 180 extending to page 184. At page 184 objection was raised to the lower Court's proceeding to disturb the orders and the judgment of the United States Court in the Indian Territory and these objections were overruled. Page 185 shows stipulation permitting the Vinita National Bank to be paid out of the funds. At page 186 appears the record entry showing a judgment entered for the payment to the Vinita National Bank on the stipulation. It further shows that no evidence was offered in opposition to the filing of the applications, except the opinion and statement of facts quoted by the Supreme Court. The journal entry permitting the payment to the Vinita National Bank can be found on page 187, and under it there was to be refunded $1059.36, and the question as to who was to pay the costs was left open. The judgment of the Court upon the last effort in the District Court can be found on page 188, and omitting the caption, is as follows:

"JUDGMENT OF THE COURT.

Now on this the 2nd day of April, 1910, the same

being one of the regular days of the March, 1910, term of the District Court, within and for Craig County, Second Judicial District of Oklahoma, the above entitled cause coming on to be heard before the Honorable T. L. Brown, Judge of said Court, upon a mandate of the Supreme Court of the State of Oklahoma, on a decision of said Court handed down and rendered in this case on the 10th day of September, 1908, and on a rehearing on September 14, 1908, and the court having duly examined said mandate and having duly considered said decision of the Supreme Court of the State of Oklahoma rendered in this case for this court to enter a judgment herein, modified to conform with the opinion of the said Supreme Court, and the Court being fully advised in the premises; now, therefore,

It is hereby ordered, considered and decreed by this Court, that the judgment of the trial court in this case heretofore rendered be, and the same is hereby affirmed in all things as rendered except that the parties to said action shall be paid their respective claims in full in so far as the proceeds will extend in the following order; that is to say —— 1st, to the Vinita National Bank its claim amounting to $809.77; 2nd, C. M. Keys & Co., and Stock Yards Bank, their claim amounting to $17,245.31 to be paid out of the funds derived from the sale of the cattle; 3rd First National Bank of Vinita its claim amounting to $4144.42; 4th, First National Bank of Claremore its claim amounting to $5413.99; 5th, Citizens Bank of Pryor Creek its claim amounting to $2083.35; 6th, J. C. Hogan his claim amounting to $6801.96; and 7th, to Mary D. Mayes, her clai mamounting to $1702.88. Each to recover their costs in this action, and interest at the rate of six per cent per annum from date of judgment.

To the rendition of this judgment each of the several parties are allowed their exceptions, and, it is further ordered by the Court that supersedeas bond be given by each of the parties who may desire to appeal from this modified judgment of the Court to be fixed at a sum double the amount of each claim herein; together with the accrued interest on same, said bonds

to be approved by the Clerk of this Court, and ninety (90) days' time given to prepare and serve a case-made upon appeal and ten (10) days' time given thereafter for the suggestion of errors and five (5) days' time allowed thereafter to settle the same.

(Signed) T. L. BROWN,
Judge of the District Court of Craig County, Oklahoma."

Objection was raised to this, and the request was made on the Court to find the amount of the supersedeas bond required; and the court refused to do so. Time was given to make a case for the respective parties, and the Citizens Bank of Pryor Creek and J. C. Hogan, and First National Bank of Vinita, and First National Bank of Claremore all reserved exceptions to the action of the lower court in rendering judgment. and in refusing to make findings.

At page 190 can be found the order for the refunding bond to be given by the respective parties. Page 191 is the refunding bond of the First National Bank of Claremore. Page 192 is the refunding bond of the First National Bank of Vinita. Page 193 is the refunding bond of the Citizens Bank. Page 194 is the refunding bond of J. C. Hogan. Page 104 can be found the Receivers Report of sale of lots and property, and at the same page can be found the order concerning the sale of the town lots.

In due time a case made was settled with reference to the second trial, and a proceeding in error was

brought in the Supreme Court of the State of Oklahoma; the proceeding in error on behalf of the First National Bank of Claremore, can be found an page 14, 15, 16 and 17, of the record in case No. 263; and, proceeding in error on behalf of the First National Bank of Vinita, ca nbe found on page 18, 19, of the record in case No. 263; and, on behalf of the Citizens Bank of Pryor Creek, on pages 20, 21, 22, in case No. 263; and, on behalf of the defendant, J. C. Hogan, can be found on pages 22, 23, and 24 and 25, in case No. 263.

The action of the Court therein was founded, in each case upon a motion made by the defendants in error to dismiss the proceedings in error. The Motion, omitting the caption, is as follows, and can be found on pages 199 and 200:

"And now comes defendants in error, C. M. Keys & Company, and Stock Yards Bank, and appear herein specifically for the purpose of this motion only, and respectfully show to the court:

I.

That there is a defect in the parties, plaintiffs in error.

2.

That there is a defect in the parties, defendants in error.

3.

That plaintiffs in error have failed to have summons in error served upon these defendants in error, as required by law.

4.

That plaintiffs in error have failed to give bond conditioned as required by law.

5.

That plaintiffs in error have failed to comply with Rule VII of this Court, and prepare and serve upon counsel for opposite parties their brief.

6.

The petition in error is filed herein for the purpose of delay only and is therefore a fraud upon the jurisdiction of this court.

7.

That the decree entered in this case by the District Court of Craig County conforms in every particular to the mandate of this court.

8.

That the decision of this court when this case was before it on appeal judicially determines every question which is now presented by the petition in error filed herein; and the District Court of Craig County, Oklahoma, entered a decree in this case in accordance with the said decision of this court, and therefore all the questions which are now raised upon this appeal have been judicially determined by a decision of this court, as is shown by report of said decision in the case of C. M. Keys & Company vs. First National Bank of Claremore, et al., 104 Pac. 346-353.

Wherefore these defendants in error move the court to dismiss the petition in error filed herein.

And in duty bound these plaintiffs in error will ever pray.

(Signed) ROBERT F. BLAIR,
Attorney for said Plaintiffs in Error."

A Response was filed by the First National Bank of Claremore and the First National Bank of Vinita, which can be found on pages 201 and 202; and omitting the caption, the same is as follows:

"The First National Bank of Claremore and the First National Bank of Vinita, respectively say:

I.

That no defect in the parties plaintiff in error ex-

ists, and no defect of parties plaintiff in error has been pointed out by the defendants in error.

II.

That no defect in parties defendant in error exists and no defect has been pointed out by the defendants in error.

III.

That the plaintiffs in error have respectfully had served upon the attorney of the defendants in error as shown by the record in the Court below, to-wit, Robert F. Blair, a summons in error.

IV.

That the plaintiffs in error have given bond as required by law, which is on file in the Court below.

V.

That the plaintiffs in error have respectfully served their briefs, on the attorney of the defendants in error as shown by the record in this cause.

VI.

That the respective petitions in error are filed for the purpose of obtaining the judgment of this court upon the points raised therein.

VII.

That the decree entered in this cause by the District Court of Craig County does not conform to the judgment of this court.

VIII.

That the decision of this Court when the case was before it did not judicially determine every question now presented by the petitions in error, and the judgment of this Court was not final and this Court refused to make it final.

IX.

That under the decisions of the Federal Supreme Court, and among others the decision of said court in the case of Henrick v. Patrick, reported in Book 30 of the Lawyers' Co-Operative Publishing Company's Edition at page 161, the proper plaintiffs in error are made in this case and the proper defendants in error are made in this case.

Wherefore, the plaintiffs in error ask that the motion of the defendants in error be not allowed.

Respectfully submitted,

W. H. KORNEGAY,

Attorney for First National Bank of Claremore, and First National Bank of Vinita."

Similar response was filed by each of the other parties, and leave to argue the motion to dismiss was asked for by the respective parties, and refused.

The Court sustained the Motion on the 8th ground and in due time separate writs of error were sued out by the plaintiff in error, First National Bank of Claremore, and served upon the parties or their attorneys, who are defendants in error, and the case docketed in this court and is numbered 263; a similar proceeding was had at the instance of the First National Bank of Vinita, plaintiff in error, and the case docketed in this court and is numbered 264; a similar proceeding was had at the instance of Citizens Bank of Pryor Creek, and the case docketed in this court as number 302; a similar proceeding was had at the instance of J. C. Hogan, and the case docketed in this coure numbered 303.

A stipulation has ben filed in each case on behalf of the parties to the effect that with the approvel of the court, a hearing of the cases may be had together, and submitted on joint hearing, and this brief is prepared on behalf of the respective plaintiffs in error

and submitted on behalf of them all, as the questions involved in all the cases are practically the same.

The plaintiff, First National Bank of Claremore, makes the following assignments of errors, which can be found on pps. 5 to 11 both inclusive, case No. 263, omitting the caption, is as follows:

"ASSIGNMENT OR ERRORS.

The plaintiff in error, First National Bank of Claremore, makes the following assignment of errors upon which it will rely upon its prosecution of the writ of error to the Supreme Court of the United States, in the above entieled cause, from the judgment rendered by the Supreme Court of th State of Oklahoma, on the 10th day of January, 1911, affirming the judgment of the District Court of Craig County, Oklahoma, and the following assignment of errors alleged to have been committed by the Supreme Court of the State of Oklahoma, upon the first appeal in this case, and it says:

I.

That the Supreme Court of the State of Oklahoma erred in dismissing the petitio nin error prosecuted by it from the judgment of the District Court of Craig County, Oklahoma.

II.

The Supreme Court of the State of Oklahoma erred in holding that all the questions presented by the second appeal were disposed of upon the first appeal.

III.

The District Court of Craig County, Oklahoma, erred in rendering judgment against the plaintiff in error, and the Supreme Court of Oklahoma erred in dismissing the proceedings in error instituted by the plaintiff in error to the judgment of the District Court of Craig County, Oklahoma.

IV.

The District Court of Craig County, Oklahoma, erred in refusing to allow the plaintiff in error to

amend its original complaint, and its affidavit in attachment, and the Supreme Court of the State of Oklahoma erred in dismissing the proceedings in error to review the judgment.

V.

The District Court of Craig County, Oklahoma, erred in refusing to allow plaintiff in error to file an amended answer to the interplea of the defendants in error, C. M. Keys & Company, and Stock Yards Bank, and the Supreme Court of Oklahoma erred in refusing to reverse the action of the District Court of Craig County, Oklahoma.

VI.

The District Court of Craig County, Oklahoma, erred in disturbing the judgment of the United States Court, in the Indian Territory, Northern District, and the Supreme Court of the United States of Oklahoma erred in refusing to reverse the action of the said District Court of Craig County, Oklahoma.

VII.

The District Court of Craig County, Oklahoma, erred in ordering that C. M. Keys & Company, and Stock Yards Bank should receive their claim amounting to $17,245.31 out of the fund arising from the sale of the catle, and the Supreme Court erred in refusing to reverse the judgment of the District Court of Craig County, Oklahoma.

VIII.

The District Court of Craig County, Oklahoma, erred in rendering judgment in the cause without trial, and the Supreme Court of the State of Oklahoma erred in refusing to reverse the action of the District Court of Craig County, Oklahoma.

IX.

The District Court of Craig County, Oklahoma, erred in refusing to allow the plaintiff in error a trial upon the issues made by the pleadings, and the Supreme Court of the State of Oklahoma, erred in refusing to reverse the action of the District Court.

X.

The District Court of Craig County, Oklahoma, erred in not providing for the payment of the costs of the cause, and in refusing to make an order as to the costs.

XI.

The Supreme Court of the State of Oklahoma, erred in refusing to reverse the action of the District Court of Craig County, Oklahoma.

XII.

The District Court of Craig County, Oklahoma, erred in not separating the cattle fund from the lot fund in the case, and in not distributing the lot fund to the proper parties, and the Supreme Court of the State of Oklahoma, erred in refusing to disturb the action of the District Court of Craig County, Oklahoma.

XIII.

The District Court of Craig County, Oklahoma, erred when it refused and failed to find the amount of recovery, if any, to be had against the plaintiff in error, and the amount that the plaintiff in error should repay and to whom, and the Supreme Court of the State of Oklahoma, erred in refusing to disturb the action of the District Court of Craig County, Oklahoma.

XIV.

The District Court of Craig County, Oklahoma, erred in rendering a judgment in favor of the interveners, C. M. Keys & Company and Stock Yards Bank, upon the facts in evidence, and the Supreme Court of the State of Oklahoma, erred in refusing to disturb the action of the District Court of Craig County, Oklahoma.

XV.

The District Court of Craig County, Oklahoma, erred in making a finding in favor of the interveners, C. M. Keys & Company and Stock Yards Bank, without an investigation as to the facts.

XVI.

The District Court of Craig County, Oklahoma, erred in postponing an attachment lien acquired under the laws of the United States to a lien asserted in

a mortgage not recorded in accordance with the laws of the United States, in a case where the mortgaged property was not in possession of the lien holder, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court of Craig County, Oklahoma.

XVII.

The District Court of Craig County, Oklahoma, erred in rendering judgment which was not based upon teh findings of fact, and which was unwarranted by the findings of fact, which were allowed to stand in the case, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court of Craig County, Oklahoma.

XVIII.

The Judgment of the District Court of Craig County, Oklahoma, is erroneous in that that it is contrary to law, and is contrary to the evidence in the cause, and the Supreme Court of the State of Oklahoma, erred in refusing to disturb the action of the District Court of Craig County, Oklahoma.

XIX.

The District Court of Craig County, Oklahoma erred in rendering judgment against the plaintiff in error, the same not being supported by sufficient evidence.

XX.

The Supreme Court of the State of Oklahoma erred in taking jurisdiction of the original appeal.

XXI.

The Supreme Court of the State of Oklahoma erred in modifying the judgment of the United States Court in the Indian Territory, Northern District, on the first appeal.

XXII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the evidence did not warrant the finding that the mortgage relied upon by C. M. Keys & Co., and Stock Yards Bank had

become fraudulent and void as against other lien claimants and attaching creditors.

XXIII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was not necessary, after the division of the Northern District of the Indian Territory into the Northern District and the Western District to have the C. M. Keys & Company and Stock Yards mortgage placed of record at Vinita.

XXIV.

The Supreme Court of Oklahoma upon the first appeal erred in holding that it was not necessary for C. M. Keys & Company and Stock Yards Bank to have their mortgage indexed at Pryor Creek, after the making of the recording districts in the Indian Territory.

XXV.

The Supreme Court of the State of Oklahoma on the first appeal erred in holding that it was not necessary for the mortgagees to take possession of the property, and was also not necessary for the mortgagees to have the mortgages put of record at Vinita, and also at Pryor Creek.

XXVI.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was admitted that the plaintiff in error had actual knowledge of the existence of the chattel mortgage to C. M. Keys & Company and Stock Yards Bank.

XXVII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the rule of law with reference to real property records was the same as in case of personal property.

XXVIII.

The Supreme Court of the State of Oklahoma, on the first appeal erred in holding that it was not the duty of the mortgagee, after the division of the districts to inform the clerk of a desire to either record or index the mortgages.

XXIX.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was not necessary for the mortgagee, after the division of the districts, to pay the fees of indexing or recording the mortgages in the new Districts where the property was located, and the mortgagors resided.

XXX.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was the duty of the Clerk of the United States Court of Indian Territory, to transfer to the indexes of other places the mortgages that had theretofore been recorded in his office, without request from the mortgagee and without payment of fees.

XXXI.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that a mortgage once recorded was notice to all persons of the existence of such mortgage.

XXXII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the filing of the mortgage henceforth gave notice to everybody of its existence notwithstanding the divisions in the districts and the change in the places of recording.

XXXIII.

The Supreme Court of the State of Oklahoma o nthe first appeal erred in holding that the Clerk of the United States Court had not urged as an excuse for his failure to record in other districts or to transfer to the indexes in other districts, the mortgage of C. M. Keys & Company, and Stock Yards Bank, his inability so to do, but had urged the want of an appropriation for it.

XXXIV.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that there was no question of actual fraud in the case, and the Supreme

Court of Oklahoma erred in holding that it was not claimed that there was any fraud in the case.

XXXV.

The Supreme Court of the State of Oklahoma erred in holding that the only theory upon which the plaintiff in error brought the suit, was that the mortgages of C. M. Keys & Company and Stock Yards Bank "were not constructive notice to subsequent purchasers, and encumbrancers, because they had not been transferred to the indexes."

XXXVI.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that C. M. Keys & Company and Stock Yards Bank had done all that was necessary to keep their mortgages alive, as required by laws of the United States relating to the recording of mortgages.

XXXVII.

The Supreme Court of the State of Oklahoma erred in the first appeal in holding that the claim of C. M. Keys & Company and Stock Yards Bank was superior tothe claim of the plaintiffs in error.

XXXVIII.

The Supreme Court of the State of Oklahoma erred on the first appeal in modifying the judgment.

XXXIX.

The Supreme Court of the State of Oklahoma erred on the rehearing of the first appeal in holding that the acknowledgment upon the C. M. Keys & Company and Stock Yards Bank mortgage was in accordance with the laws of the United States.

XL.

The Supreme Court of the State of Oklahoma erred in holding upon the re-hearing of the first appeal that there was no fraud, either actual or by operation of law, in the United States of dealing with the mortgaged property allowed by C. M. Keys & Company, and Stock Yards Bank.

XLI.

The Supreme Court of the State of Oklahoma

erred in holding that there was no evidence to support the finding of the United States Court in Indian Territory, to the effect that there was fraud in the method of handling the mortgaged property, such as to invalidate the C. M. Keys & Company and Stock Yards Bank mortgage.

XLII.

The Supreme Court of the State of Oklahoma erred in holding that the evidence did not show that any of the creditors of Wat Mayes were prejudiced in any way to the dealings of Wat Mayes with C. M. Keys & Company or their assignees, Stock Yards Bank.

XLIII.

The Supreme Court of the State of Oklahoma erred in holding that the charge of fraud by the defendants in error was without foundation.

XLIV.

The Supreme Court of the State of Oklahoma erred in refusing to render a judgment, if they were going to reverse the case, providing for the distribution of the funds derived from the sale of lots, and the funds derived from the sale of the cattle, and erred in refusing to give instructions to the Court below what to do upon this matter.

The plaintiff in Error says that all things complained of in the assignment of error took place over its objections and exceptions, and to its damage.

Wherefore, the plaintiff in error says that the judgment of the Supreme Court of the State of Oklahoma, dismissing its proceedings in error to the District Court of Craig County, Oklahoma, be reversed: that the judgment of the District Court of Craig County, Oklahoma, be reversed; that the judgment of the Supreme Court of the State of Oklahoma upon the first appeal by C. M. Keys & Company and Stock Yards Bank from the judgment of the United States Court, Indian Territory, Northern District, be reversed; and, that the judgment of the United States Court in the Indian Territory, Northern District, be, in all things affirmed, and that proper instructions be given

to the lower court for carrying out the judgment of this court.

The plaintiff in error, First National Bank of Vinita, makes the following assignments of errors:

I.

The District Court of Craig County, Oklahoma, erred in refusing to allow it to file amended pleadings.

II.

The District Court of Craig County, Oklahoma, ererd in refusing to allow this plaintiff in error to file an amended answer to the interplea of the defendants in error, C. M. Keys & Co. and Stock Yards Bank.

III.

The District Court of Craig County, Oklahoma, ererd in distributing the judgment of the United States Court in the Indian Territory, Northern District.

IV.

The District Court of Craig County, Oklahoma, erfred in ordering that C. M. Keys & Co. and Stock Yards Bank should receive their claim amounting to $17,245.31, out of the fund derived from the sale of the cattle.

V.

The District Court of Craig County, Oklahoma, erred in rendering judgment in the cause without a trial.

VI.

The District Court of Craig County, Oklahoma, erred in refusing to allow this plaintiff in error a trial upon the issues made by the pleadings.

VII.

The judgment of the District Court of Craig County, Oklahoma, is erroneous in that it does not provide for the payment of costs, in the case and by whom the costs are to be paid.

VIII.

The judgment of the District Court of Craig County, Oklahoma, is erroneous in that it did not sepa-

rate the cattle fund from the lot fund in the case and distribute the lot fund to the proper party.

The plaintiff, First National Bank of Vinita, makes the following assignment of errors, which can be found on pps. 5 to 10 both inclusive, in case No. 264, omitting the caption which are as follows:

"ASSIGNMENT OF ERRORS.

The plaintiff in error, First National Bank of Vinita, makes the following assignment of errors, upon which it will rely upon its prosecution of the writ of error to the Supreme Court of the United States, in the above entitled cause, from the judgment rendered by the Supreme Court of the State of Oklahoma, on the 10th day of January, 1911, affirming the judgment of the District Court of Craig County, Oklahoma, and the following assignment of errors alleged to have been committed by the District Court of Craig County, Oklahoma, and the following assignment of errors alleged to have been committed by the Supreme Court of the State of Oklahoma, upon the first appeal in this cause, and it says:

I.

That the Supreme Court of Oklahoma erred in dismissing the petition in error prosecuted by it from the judgment of the District Court of Craig County, Oklahoma.

II.

The Supreme Court of the State of Oklahoma erred in holding that all the questions presented by the second appeal were disposed of upon the first appeal.

III.

The District Court of Craig County, Oklahoma erred in rendering judgment against the plaintiff in error, and the Supreme Court of Oklahoma erred in dismissing the proceedings in error instituted by the plaintiff in error to the judgment of the District Court of Craig County, Oklahoma.

IV.

The District Court of Craig County Oklahoma erred in refusing to allow the plaintiff in error to amend its pleadings and the Supreme Court of the State of Oklahoma, erred in dismissing the proceedings in error to review the judgment.

V.

The District Court of Craig County, Oklahoma erred in refusing to allow the plaintiff in error to file an amended answer to the interplea of the defendants in error, and the Supreme Court of the State of Oklahoma erred in refusing to reverse the order of the District Court of Craig County, Oklahoma.

VI.

The District Court of Craig County, Oklahoma, erred in holding that the claims of the defendants in error to the cattle fund were superior to the claim of the plaintiff in error, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court of Craig County, Oklahoma.

VII.

The District Court of Craig County, Oklahoma, erred in undertaking to disturb the action of the United States Court, in the Indian Territory, Northern District, awarding to this plaintiff in error payment out of the cattle fund of the amount due it from the defendant, Wat Mayes, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court of Craig County, Oklahoma.

VIII.

The District Court of Craig County, Oklahoma, erred in rendering the judgment it did upon the findings of fact that were made by the United States Court in the Indian Territory, Northern District, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

IX.

The District Court of the County of Craig, State of Oklahoma, erred in rendering judgment without

making findings of fact, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

X.

The District Court of Craig County, Oklahoma, erred in not segregating the cattle fund from the lot fund, and in not making separate distribution of the respective funds, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XI.

The District Court of Craig County, Oklahoma, erred in not finding the amount that it should repay and to whom, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XII.

The District Court of Craig County erred in not finding specifically the amount of the costs that should be taxed to the various parties in the case, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XIII.

The District Court of Craig County, Oklahoma, erred in exhausting the cattle fund by ordering that it should be paid to C. M. Keys & Company and Stock Yards Bank, to the detriment of this plaintiff in error, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XIV.

The District Court of Craig County, Oklahoma, erred in rendering judgment without a trial, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XV.

The District Court of Craig County, Oklahoma, erred in holding that the mortgage relied upon by the defendants in error was duly of record under the laws of the United States, and under the laws of the United States was superior to the mortgage of the plaintiff.

and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XVI.

The District Court of Craig County, Oklahoma, erred in rendering judgment against the plaintiff in error.

XVII.

The Supreme Court of the State of Oklahoma, erred in taking jurisdiction of the original appeal.

XVIII.

The Supreme Court of the State of Oklahoma erred in modifying the judgment of the United States Court of the Indian Territory, Northern District on the first appeal.

XXII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the evidence did not warrant the finding that the mortgage relied upon by C. M. Keys & Company and Stock Yards Bank had become fraudulent and void as against other lien claimants and attaching creditors.

XXIII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was not necessary, after the division of the Northern District of the Indian Territory into the Northern District and the Western District, to have the C. M. Keys & Company and Stock Yards mortgage placed of record at Vinita.

XXIV.

The Supreme Court of the State of Oklahoma on the first appeal erred in holding that it was not necessary for C. M. Keys & Company and Stock Yards Bank t ohave their mortgage indexed at Pryor Creek, after the making of the recording districts in the Indian Territory.

XXV.

The Supreme Court of the State of Oklahoma on the first appeal erred in holding that it was not necessary for the mortgagee to take possession of the pro-

perty, and was also not necessary for the mortgagee to have the mortgages put of record at Vinita and also at Pryor Creek.

XXVI.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was admitted that the plaintiff in error had actual knowledge of the existence of the chattel mortgage to C. M. Keys & Company and Stock Yards Bank.

XXVII.

The Supreme Court of the State of Oklahoma on the first appeal erred in holding that it was not necessary for the mortgagee, after the division of the districts to pay the fees of indexing or recording the mortgages in the new districts, where the property was located and the mortgagors resided.

XXIX.

The Supreme Court of the State of Oklahoma erred on the first appeal, in holding that it was the duty of the Clerk of the United States Court of Indian Territory to transfer to the indexes at other places the mortgages that had theretofore been recorded in his office, without request upon the mortgagees and without the payment of the fees.

XXX.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that a mortgage once recorded was notice to all persons of the existence of such mortgage.

XXXI.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the filing of the mortgage henceforth gave notice to everybody of its existence, notwithstanding the divisions of the districts and the change of the places of recording.

XXXII.

The Supreme Court of the State of Oklahoma on the first appeal erred in holding that the Clerk of the United States Court had not urged as an excuse for his failure to record in other districts or to trans-

fer to the indexes in other districts, the mortgage of C. M. Keys & Company, and Stock Yards Bank, his inability so to do, but had urged the want of an appropriation for it.

XXXIII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that there was no question of actual fraud in the case, and that the Supreme Court of Oklahoma erred in holding that it was not claime dthat there was any fraud in the case.

XXXIV.

The Supreme Court of Oklahoma erred on the first appeal in holding that C. M. Keys & Company and Stock Yards Bank had done all that was necessary to keep their mortgages alive, as required by the laws of the United States relating to recording of mortgages.

XXXV.

The Supreme Court of the State of Oklahoma erred in the first appeal in holding that the claim of C. M. Keys & Company and Stock Yards Bank was superior to the claim of the plaintiffs in error.

XXVI.

The Supreme Court of the State of Oklahoma erred on the first appeal in modifying the judgment.

XXXVII.

The Supreme Court of the State of Oklahoma erred on re-hearing of the first appeal in holding that the acknowledgment upon the C. M. Keys & Company and Stock Yards Bank mortgage was in accordance with the laws of the United States.

XXXVIII.

The Supreme Court of the State of Oklahoma erred in holding upon the re-hearing of the first appeal that there was no fraud, either actual or by operation of law, in the method of dealing with the mortgaged property allowed by C. M. Keys & Company, and Stock Yards Bank.

XXXIX.

The Supreme Court of the State of Oklahoma erred in holding that there was no evidence to support

the finding of the United States Court in Indian Territory, Northern District, to the effect that there was fraud in the method of handling the mortgaged property, such as to invalidate the C. M. Keys & Company and Stock Yards Bank mortgage.

XL.

The Supreme Court of the State of Oklahoma erred in holding that the evidence did not show that any of the creditors of Wat Mayes were prejudiced in any way by the dealings of Wat Mayes with C. M. Keys & Company or their assignees, Stock Yards Bank.

XLI.

The Supreme Court of the State of Oklahoma erred in holding that the charge of fraud by the defendants in error was without foundation.

XLII.

The Supreme Court of the State of Oklahoma erred in refusing to render a judgment upon the reversal of the case, providing for the distribution of the funds derived from the sale of the lots, and the funds derived from the sale of th ecattle, and erred in refusing to give instructions to the court below what to do upon this matter.

The plaintiff in error says that all things complained of in the assignment of errors took place over its objection and exception, and to its damage, and against its rights as given by the laws of the United States.

Wherefore, the plaintiff in error prays that the judgment of the Supreme Court of the State of Oklahoma dismissing its proceedings in error to the District Court of Craig County, Oklahoma, be reversed; that the judgment of the District Court of Craig County, Oklahoma, be reversed; that the judgment of the Supreme Court of the State of Oklahoma, upon the first appeal by C. M. Keys & Company and Stock Yards Bank from the judgment of the United States Court, of Indian Territory, Northern District be reversed; and, that the judgment of the United States Court in the Indian Territory, Northern District, be,

in all things affirmed, and that proper instructions be given to the lower court for carrying out the judgment of this court.

FIRST NATIONAL BANK OF VINITA,
Plaintiff in Error.
By W. H. Kornegay, Attorney."

The plaintiff in error, Citizens Bank of Pryor Creek, mawes the following assignment of errors, which can be found on pps. 4 to 10, of case No. 302, omitting the caption, which is as follows:

"ASSIGNMENT OF ERRORS.

The plaintiff in error, Citizens Bank of Pryor Creek, makes the following assignment of errors upon which it will rely upon its prosecution of the writ of error to the Supreme Court of the United States, in the above entitled cause, from the judgment rendered by the Supreme Court of the State of Oklahoma, on the tenth day of January, 1911, affirming the judgment of the District Court of Craig County, Oklahoma, and the following assignment of errors alleged to have been committed by the District Court of Craig County, Oklahoma, and the following assignment of errors alleged to have been committed by the Supreme Court of the State of Oklahoma, upon the first appeal in this cause, and it says:

I.

That the Supreme Court of the State of Oklahoma erred in dismissing the petition in error prosecuted by it from the judgment of the District Court of Craig County, Oklahoma.

II.

The Supreme Court of the State of Oklahoma erred in holding that all the questions presented by the second appeal were disposed of upon the first appeal.

III.

The District Court of Craig County, Oklahoma erred in rendering judgment against the plaintiff in

error, and the Supreme Court of the State of Oklahoma erred in dismissing the proceedings in error instituted by the plaintiff in error to the judgment of the District Court of Craig County, Oklahoma.

IV.

The District Court of Craig County, Oklahoma, erred in refusing to allow the plaintiff in error to amend its pleadings, and the Supreme Court of the State of Oklahoma, erred in dismissing the proceedings in error to review the judgment.

V.

The District Court of Craig County, Oklahoma, erred in refusing to allow the plaintiff in error to file an amended answer to the interplea of the defendants in error, and the Supreme Court of the State of Oklahoma, erred in refusing to reverse the order of the District Court of Craig County, Oklahoma.

VI.

The District Court of Craig County, Oklahoma, erred in holding that the claims of the defendants in error to the cattle fund were superior to the claims of the plaintiff in error, and the Supreme Court of the State of Oklahoma, erred in refusing to disturb the action of the District Court of Craig County, Oklahoma.

VII.

The District Court of Craig County, Oklahoma, erred in undertaking to disturb the action of the United States Court, in the Indian Territory, Northern District, awarding to this plaintiff in error payment out of the cattle fund of the amount due it from the defendant, Wat Mayes, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court of Craig County, Oklahoma.

VIII.

The District Court of Craig County, Oklahoma, erred in rendering the judgment it did upon the findings of fact that were made by the United States Court in the Indian Territory, Northern District, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

IX.

The District Court of the County of Craig, State of Oklahoma, erred in rendering judgment without making findings of fact, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

X.

The District Court of Craig County, Oklahoma, ererd in not segregating the cattle fund from the lot fund, and in not making separate distribution of the respective funds, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XI.

The District Court of Craig County, Oklahoma, erred in not finding the amount that it should repay and to whom, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XII.

The District Court of Craig County, Oklahoma, erred in not finding specifically the amount of the costs that should be taxed to the various parties in the case, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XIII.

The District Court of Craig County, Oklahoma, erred in exhausting the cattle fund by ordering that it should be paid to C. M. Keys & Company and Stock Yards Bank, to the detriment of this plaintiff in error, and the Supreme Court of the State of Oklahoma erred in refusing the disturb the action of the District Court.

XIV.

The District Court of Craig County, Oklahoma, erred in rendering judgment without a trial, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XV.

The District Court of Craig County, Oklahoma

erred in holding that the mortgage relied upon by the defendants in error was duly of record under the laws of the United States, and under the laws of the United States was superior to the mortgage of the plaintiff in error, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XVI.

The District Court of Craig County, Oklahoma, erred in rendering judgment against the plaintiff in error.

XVII.

The Supreme Court of the State of Oklahoma erred in taking jurisdiction of the original appeal.

XVIII.

The Supreme Court of the State of Oklahoma erred in modifying the judgment of the United States Court of the Indian Territory, Northern District, on the first appeal.

XIX.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the evidence did not warrant the finding that the mortgage relied upon by C. M. Keys & Company and Stock Yards Bank had become fraudulent and void as against other lien claimants and attaching creditors.

XX.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it wa snot necessary, after the division of the Northern District of the Indian Territory into the Northern District and the Western District, tohave the C. M. Keys & Company and Stock Yards Bank mortgage placed of record at Vinita.

XXI.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was not necessary for C. M. Keys & Company and Stock Yards Bank to have their mortgage indexed at Pryor Creek.

after the making of the recording districts in the Indian Territory.

XXII.

The Supreme Court of the State of Oklahoma erred in the first appeal in holding that it was not necessary for the mortgagee to take possession of the property, and was also not necessary for the mortgagee t ohave the mortgages put of record at Vinita, and also at Pryor Creek.

XXIII.

The Supreme Court of the State of Oklahoma, erred on the first appeal in holding that it was admitted that the plaintiff in error had actual knowledge of the existence of the chattel mortgage to C. M. Keys & Company and Stock Yards Bank.

XXIV.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the rule of law with reference to real property records was the same as in case of personal property.

XXV.

The Supreme Court of the State of Oklahoma on the first appeal in holding that it was not necessary for the mortgagee, after the division of the districts, to pay the fees in indexing or recording the mortgages in the new districts, where the property was located and the mortgagors resided.

XXVI.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was the duty of the Clerk of the United States Court of Indian Territory to transfer to the indexes at other places the mortgages that had theretofore been recorded in his office, without request from the mortgagees and without payment of the fees.

XXVII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that a mortgage once recorded was notice to all persons of the existence of such mortgage.

XXVIII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the filing of the mortgage henceforth gave notice to everybody of its existence, notwithstanding the divisions of the Districts and the change of the places of recording.

XXIX.

The Supreme Court of the State of Oklahoma on the first appeal erred in holding that the Clerk of the United States Court had not urged as an excuse for his failure to record in other districts or to transfer to the indexes in other districts the mortgage of C. M. Keys & Company, and Ctock Yards Bank, his inability so to do, but had urged the want of an appropriation for it.

XXX.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that there was no question of actual fraud in the case, and that the Supreme Court of the State of Oklahoma erred in holding that it was not claimed that there was any fraud in the case.

XXXI.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that C. M. Keys & Company and Stock Yards Bank had done all that was necessary to keep their mortgages alive, as required by the laws of the United States relating to recording of mortgages.

XXXII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the claim of C. M. Keys & Company and Stock Yards Bank was superior to the claims of the plaintiff in error.

XXXIII.

The Superior Court of the State of Oklahoma erred on the first apepal in modifying the judgment.

XXXIV.

The Supreme Court of the State of Oklahoma erred on rehearing of the first appeal in holding that

the acknowledgment upon the C. M. Keys & Company and Stock Yards Bank mortgage was in accordance with the laws of the United States.

XXXV.

The Supreme Court of the State of Oklahoma erred on the first appeal on re-hearing in holding that there was no evidence to support the finding of the United States Court in Indian Territory, Northern District, to the effect that there was fraud in the method of handling the mortgaged property, such as to invalidate the C. M. Keys & Company and Stock Yards Bank mortgage.

XXXVI.

The Supreme Court of the State of Oklahoma erred in holding that the evidence did not show that any of the creditors of Wat Mayes were prejudiced in any way by the dealings of Wat Mayes with C. M. Keys & Company of their assignees, Stock Yards Bank.

XXXVII.

The Supreme Court of the State of Oklahoma erred in holding that the charge of fraud by the defendants in error was without foundation.

XXXVIII.

The Supreme Court of the State of Oklahoma erred in refusing to render a judgment if they were going to reverse the case, providing for the distribution of the funds derived from the sale of the lots, and the funds derived from the sale of the cattle, and erred in refusing to give instructions to the Court below what to do upon this matter.

The plaintiff in error, J. C. Hogan, makes the following assignment of errors, which can be found on pps. 4 to 10 both inclusive i nthe record of Case No. 303, omitting the caption is as follows:

"ASSIGNMENT OF ERRORS.

The plainti ffin error, J. C. Hogan, makes the following assignment of errors upon which he will rely

upon his prosecution of the writ of error to the Supreme Court of the United States, in the above entitled cause, from the judgment rendered by the Supreme Court of the State of Oklahoma, on the tenth day of January, 1911, affirming the judgment of the District Court of Craig County, Oklahoma, and the following assignment of errors alleged to have been committed by the District Court of Craig County, Oklahoma, and the following assignment of errors, alleged to have been committed by the Supreme Court of the State of Oklahoma, upon the first appeal in this cause, and it says:

I.

That the Supreme Court of the State of Oklahoma erred in dismissing the petition in error prosecuted by him from the judgment of the District Court of Craig County, Oklahoma.

II.

The Supreme Court of the State of Oklahoma erred in holding that all the questions presented by the second appeal were disposed of upon the first appeal.

III.

The District Court of Craig County, Oklahoma, erred in rendering judgment against plaintiff in error, and the Supreme Court of the State of Oklahoma erred in dismissing the proceedings in error instituted by the plaintiff in error to the judgment of the District Court of Craig County, Oklahoma.

IV.

The District Court of Craig County, Oklahoma, erred in refusing to allow the plaintiff in error to amend his pleading and the Supreme Court of the State of Oklahoma erred in dismissing the proceedings in error to review the judgment.

V.

The District Court of Craig County, Oklahoma, erred in refusing to allow the plaintiff in error to file an amended answer to the interplea of the defendants in error, and the Supreme Court of the State of Okla-

homa erred in refusing to reverse the order of the District Court of Craig County, Oklahoma.

VI.

The District Court of Craig County, Oklahoma, erred in holding that the claims of the defendants in error to the cattle fund were superior to the claims of the plaintiff in error, and the Supreme Court of the State of Oklahoma, erred in refusing to disturb the action of the District Court of Craig County, Oklahoma.

VII.

The District Court of Craig County, Oklahoma, erred in undertaking to disturb the action of the United States Court, in the Indian Territory, Northern District, awarding to this plaintiff in error payment out of the cattle fund of the amount due it from the defendant, Wat Mayes, and the Supreme Court of the State of Oklahoma, erred in refusing the disturb the action of the District Court of Craig County, Oklahoma.

VIII.

The District Court of Craig County, Oklahoma, erred in rendering judgment it did upon the findings of fact that were made by the United States Court in the Indian Territory, Northern District, and the Supreme Court of the State of Oklahoma, erred in refusing to disturb the action of the District Court.

IX.

The District Court of Craig County, Oklahoma, erred in rendering judgment without making findings of fact, and the Supreme Court of the State of Oklahoma, erred in refusing to disturb the action of the District Court.

X.

The District Court of Craig County, Oklahoma, erred in not segregating the cattle fund from the lot fund, and in not making separate distribution of the respective funds, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XI.

The District Court of Craig County, Oklahoma, erred in not finding the amount that he should repay and to whom, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XII.

The District Court of Craig County, Oklahoma, erred in not finding specifically the amount of the costs that should be taxed to the various parties in the case, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XIII.

The District Court of Craig County, Oklahoma, erred in exhausting the cattle fund by ordering that it should be paid to C. M. Keys & Company and Stockards Bank, to the detriment of this plaintiff in error, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XIV.

The District Court of Craig County, Oklahoma, erred in rendering judgment without a trial, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XV.

The District Court of Craig County, Oklahoma, erred in holding that the mortgage relied upon by the defendants in error was duly of record under the laws of the United States, and under the laws of the United States was superior to the mortgage of the plaintiff in error, and the Supreme Court of the State of Oklahoma erred in refusing to disturb the action of the District Court.

XVI.

The District Court of Craig County, Oklahoma, erred in rendering judgment against the plaintiff in error.

XVII.

The Supreme Court of the State of Oklahoma erred in taking jurisdiction of the original appeal.

XVIII.

The Supreme Court of the State of Oklahoma erred in modifying the judgment of the United States Court of the Indian Territory, Northern District, on the first appeal.

XIX.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the evidence did not warrant the finding that the mortgage relied upon by C. M. Keys & Company and Stock aYrds Bank had become fraudulent and void, as against other lien claimants and attaching creditors.

XX.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was not necessary, after the division of the Northern District of the Indian Territory, into the Northern District and the Western District, to have the C. M. Keys & Company and Stock Yards Bank mortgage placed of record at Vinita.

XXI.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was not necessary for C. M. Keys & Company and Stock Yards Bank to have their mortgage indexed at Pryor Creek, after the making of the recording districts in the Indian Territory.

XXII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was not necessary for the mortgagee to take possession of the property, and was also not necessary for the mortgagee to have the mortgages put of record at Vinita, and also at Pryor Creek.

XXIII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was admitted that the plaintiff in error had actual knowledge of the existence of the chattel mortgage to C. M. Keys & Company and Stock Yards Bank.

XXIV.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the rule of law with reference to real property records was the same as in case of personal property.

XXV.

The Supreme Court of the State of Oklahoma on the first appeal erred in holding that it was not necessary for the mortgagee, after the division of the districts, to pay the fees of indexing or recording the mortgages in the new districts, where the property was located and the mortgagors resided.

XXVI.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that it was the duty of the Clerk of the United States Court of Indian Territory to transfer to the indexes at other places the mortgages that had theretofore been recorded in his office, without request upon the mortgagees and without payment of the fees.

XXVII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that a mortgage once recorded with notice to all persons of the existence of such mortgage.

XXVIII.

The Supreme Court of the State of Oklahoma. erred on the first appeal in holding that the filing of the mortgage henceforth gave notice to everybody of its exisctence, notwithstanding the divisions of the Districts and the change of the place of recording.

XXIX.

The Supreme Court of the State of Oklahoma on the first appeal erred in holdnig that the Clerk of the United States Court had not urged as an excuse for his failure to reco drin other districts or to transfer to the indexes in other districts, the mortgage of C. M. Keys & Company and Stock Yards Bank his inability so to do, but had urged the want of an appropriation for it.

XXX.

The Supreme Court of the State of Oklahoma

erred on the first appeal in holding that there was no question of actual fraud in the case, and that the Supreme Court of the State of Oklahoma erred in holding that it was not claimed that there was any fraud in the cast.

XXXI.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that C. M. Keys & Company and Stock Yards Bank had done all that was necessary to keep their mortgages alive, as required by the laws of the United States relating to recording of mortgages.

XXXII.

The Supreme Court of the State of Oklahoma erred on the first appeal in holding that the claim of C. M. Keys & Company and Stock Yards Bank was superior to the claim of the plaintiffs in error.

XXXIII.

The Supreme Court of the State of Oklahoma erred on the first appeal in modifying the judgment.

XXXIV.

The Supreme Court of the State of Oklahoma erred on re-hearing of the first appeal in holding that the acknowledgment upon the C. M. Keys & Company and Stock Yards Bank mortgage was in accordance with the laws of the United States.

XXXV.

The Supreme Court of the State of Oklahoma erred on the first appeal on re-hearing in holding that there was no evidence to support the finding of the United States Court in Indian Territory, Northern District, to the effect that there was fraud in the method of handling the mortgaged property, such as to invalidate the C. M. Keys & Company and Stock Yards Bank mortgage.

XXXVI.

The Supreme Court of the State of Oklahoma erred in holding that the evidence did not show that any of the creditors of Wat Mayes were prejudiced in any way by the dealings of Wat Mayes with C. M.

Keys & Company or their assignees, Stock Yards Bank.

XXXVII.

The Supreme Court of the State of Oklahoma erred in holding that the charge of fraud by the defendants in error was without foundation.

XXXVIII.

The Supreme Court of the State of Oklahoma erred in refusing to render a judgment, if they were going to reverse the case, providing for the distribution of the funds derived from the sale of the lots, and the funds derived from the sale of the cattle, and erred in refusing to give instructions to the court below what to do upon this matter.

ARGUMENT.

During the progress of the litigation by agreement of all parties the claim of Vinita National Bank was paid by an advance made by First National Bank of Vinita, and for the purpose of this proceeding, its claim is practically eliminated, and the question for this court to consider is a question of priority as between the First National Bank of Claremore, the attaching creditor, and Stock Yards Bank the holder of the C. M. Keys & Co. note and mortgage, and the question of priority as between First National Bank of Vinita and Stock Yards Bank and the question of priority between the Citizens Bank of Pryor Creek, and Stock Yards Bank, and question of priority between J. C. Hogan and Stock Yards Bank.

The case has heretofore been carried on by the plaintiffs in error, on the theory that as between them

the decree of the United State court in the Indian Territory is correct, and the order of payment provided for therein is correct. In view of the fact that the determination of the same questions are largely involved in the respective proceedings in error, and that the assignments in number 263, wherein First National Bank of Claremore is plaintiff in error, practically cover the same grounds, as the assignments in the other cases, the assignments contained there will be first considered. Assignment number one is based on the action of the Supreme Court of Oklahoma in dismissing the proceedings in error, from the District Court of Craig County.

From the record it appears that the first time the matter was before the Supreme Court of Oklahoma, it took jurisdiction upon the theory, that it under the enabling Act was the successor of the United States Court of Appeals in the Indian Territory. The case as presented to that court was an appeal from a judgment of the United States Court in the Indian Territory. When the opinion reversing the decree was rendered, before the mandate was sent down a motion was filed with the Supreme Court, asking that court in in view of its opinion to render final judgment and not to remand the case. See pages 168-169. On page 170, that court made an order denying the request. In that state of the case the cause came before the District

Court of Craig County. Under the general law and under Section 5080 of Mansfield's Digest of the statutes of Arkansas it was the duty of the court at any stage of the proceeding to permit the amendment of the pleadings, by adding other allegations. The United States Court was evidently of the opinion that the allegation denying the existence of any lien was sufficient to raise the question of fraud in the mortgage arising from the method of dealing. The Supreme Court of Oklahoma took a different view, and stated. "It will be seen from these pleadings that no question of fraud was alleged by any of the parties against the other." Under Section 5065 of Mansfield's Digest the court was required to liberally construe the answer to the interplea. Under that section, the pleading put in issue the existence of any indebtedness, mortgage or lien, and it was so treated by the United States Court.

When the Supreme Court held, that the pleading was not sufficient to put these matters in issue, did not jutice and common fairness demand that the amendment offered should have been permitted? The amended pleadings expressly charged fraud in handling the cattle under the mortgage. See pages 148, 149, 151, 152 and 156. On the proopsition of the sufficiency of the pleading concerning fraud, which was right, the Supreme Court of Oklahoma, or the United States Court in the Indian Territory? According to Bates

Pleading and Practice, page 1331, whenever the plaintiff's title is fraudulent or unfounded as against defendant, under a denial of ownership, fraud may be shown. In Kenwood vs. Akers, 59 Ks., 343, it is held that the rules in conversion and replevin are the same. The Supreme Court of Oklahoma in Payne vs. McCormick Harvesting Machinery Co., 66 Pacific 287 held that under a denial very similar to this fraud could be shown. Reason seems to be on the side of the United States Court as well as authority that should have governed the Supreme Court of Oklahoma on the question of practice. If the complaining parties under these circumstances did not plead more specifically in the first instance, was not the refusal to allow the amended pleading, rather a punishment for a sin of omission than an ajudication under the statute of Jeofailes? It must also be remembered that at the instance of some of the litigants, the lots onwhichplaintiff held a first mortgage were sold and the proceeds mingled with the cattle fund and actually paid out. Under these conditions was it not incumbent on the appellate court as well as the District to make provisions concerning this branch of the case? It should not be presumed that the Supreme Court was so unjust as to take the money derived from the lots and turn it over to Stock Yards Bank. The last clause of the opinion on page 184 in effect so holds, though the court

probably did not so intend. By reference to page 135 of the transcript it will be seen that the funds were added together. It will be seen by reference to page 137 that First National Bank of Claremore was to get its money out of the cattle fund and the lot fund was to pay subsequent creditors. Under these conditions, it certainly looks as though the Supreme Court invited the lower court to take the lot money away from plaintiff in any event. The District Court of Craig County apparently trying to follow the suggestion of the Supreme Court did not separate the funds, did not give to the lot holder the money but made a sweeping finding directing that there should be paid to C. M. Keys & Co. and Stock Yards Bank sufficient to exhaust both funds. See page 188. It did not say who should pay, or how the judgment should be paid or to whom. Finding the matter as it came from the Supreme Court in a confused state, the District Court added more confusion and the Supreme Court then said, when asked for an interpretation, and a judgment defining the rights of the parties, that they would dismiss because the court below entered judgment in substantial conformity with the directions of the appellate court. All this was done with a record before the Court of the mingling of the funds and the giving of the refunding bonds. See page 204. See page 190-191. Perhaps it may be argued that b ydismissing the proceedings in

this way the right of review by this court could be cut off. It is not believed that any court by refusing to render a final judgment and remanding the case for further proceeding can by dismissing the second appeal without a hearing deprive a litigant of a right of review by this court of its action. The second assignment of error has in some respects been discussed under the first assignment. When the lower court decided that the pleading was sufficient to present the question of fraud and the Supreme Court held that the pleadings were not broad enough to present it, but refused to pronounce judgment, the parties on general principles of right ought to be permitted to amend the pleading to cure the defect.

The third assignment of error challenges the entire proceedings, and with it will be discussed assignments, No. 4, 5, 6, 7, 8, 9, 10, 10, 11, 12, 13, 14-15-16-17-18-19.

These assignments in detail raise the various questions o fpractice. Perhaps it may be claimed that the lower court merely followed the directions of the higher court. An analysis of what the higher court said the first time indicates that it did not but the higher court said it did. We therefore proceed to ascertain what the lower court did and whether the legal rights of plaintiffs in error were infringed upon.

The record on page 188 shows the following:

"It is hereby ordered, considered and decreed by this Court that the judgment of the trial court in this case heretofore rendered, be, and the same is hereby affirmed in all things as rendered except that the parties to said action shall be paid their respective claims herein in full in so far as the proceeds will extend in the following order; that is to say, 1st. To the Vinita National Bank its claim amounting to $809.77; 2nd. C. M. Keys & Co. and Stock Yards Bank, their claim amounting to $17,245.31, to be paid out of the funds derived from the sale of the cattle; 3rd. First National Bank of Vinita its claim amounting to $4144.42; 4th. First National Bank of Claremore its claim amounting to $5413.99; 5th. Citizens Bank of Pryor Creek its claim amounting to $2083.35; 6th. J. C. Hogan his claim amounting to $6801.96; 7th. To Mary D. Mayes, her claim amounting to $1802.88. Each to recover their costs in this action and interest at the rate of six per cent per annum from date of judgment.

To the rendition of this judgment each of the several parties are allowed their exceptions."

Does this mean that the findings of fact as made are allowed to stand? Does it mean that the conclusions of law are allowed to stand? Does it mean that The Stock Yards Bank can get $17,245.31 out of the cattle fund alone or the fund derived from the cattle and the lots? Under the original decree the funds

were mingled. See page 137. Does the Decree of the District Court undertake to start the drawing of interest from April 2, 1910, the date of the rendition of the judgment or from Jan. 7th, 1907, the date of the original judgment?

From whom is the recovery under the judgment of the District Court to be had? What costs are to be recovered? With a record of this character before the Supreme Court, it certainly looks as though, if it was very considerate of the rights of the litigants, it would have investigated more closely than its decision indicates. It refused to allow any discussion of the motion to dismiss though it went to the merits of the case. See page 201. A response was all that was allowed to be filed. See page 202.

An analysis of the opinion of the Supreme Court of the state of Oklahoma shows clearly that the court was of the opinion; 1st. That the law of recording chattel mortgages and the law of recording instruments affecting real estate is the same and based on the same principles. 2nd. That the court was of the opinion that when a chattel mortgage was once recorded that it would remain of record for all time and would afford constructive notice of its existence indefinitely, regardless of the changes in the law. 3d. That the act of congress in the particular case threw duties and responsibilities upon the officers, that were

incapable of performance, by them unaided by suggestions from the lien holders, and required the lien holder to do nothing. 4th. That the court in arriving at the conclusion that the officer had been derelict in duty assumed that because the officer had stated that there was no appropriation to cover the indexing, therefore the officer conceded that it was his duty to transfer them to the indexes without pay and without direction fro mthe mortgagee, and therefore Congress had so declared. In the original opinion at page 177 the court in quoting the act substituted for a very material portion of the act some asterisks. The part supplied by asterisks was as follows: "But shall be transferred to the indexes without further cost." The court declared that it had no doubt as to the intention of Congress being to require the same officer who had charge of the indexes to make the transfer. Again the court was of the opinion that the expression "without further cost," meant the same thing as without cost. On the rehearing the court was of the opinion and held that because the master had found in making his report that there had been renewals of the Vinita National Bank mortgage, that the other parties who had not filed a cross appeal could not question the validity of the renewal ajdavits. This of course has now passed out of the case. On the rehearing the court was of the opinion that the parties could not attack the valid-

ity of the acknowledgment of the chattel mortgage because no objection was raised to its introduction in evidence. Because an instrument relied upon was introduced in evidence would by no means establish its validity. If this were so no instrument that was attacked for fraud or invalidity could be brough to the attention of the court unless the party attacking it should object to its introduction in evidence, a position that is utterly untenable. On the rehearing the court announced that it could not find in the evidence any evidence of fraud. Of course no witness said there was fraud, and the master in chancery seemed to think that the mortgage of Stock Yards Bank being invalid as against the other mortgagees and the plaintiff in the case, it was not necessary to go further, but the trial court which under the system in force in the Indian Territory must make its findings, finally passed on the case and made its ow nfindings, and found that there was fraud, arising from the course of dealing and the method shown of accounting.

An inspection of the record will show some of the inaccuracies in the opinion. By reference to page 93 of the record it will be found that the Clerk of the Court testified as to two branches of the recording law. Beginning on page 93, his testimony on the subject was as follows, upon being examined by the attorney for the Vinita National Bank:

"Q. What was done by your office in regard to indexing mortgages at different recording towns and recording districts of the Northern District of the Indian Territory after the division?

A. July 1, 1902, to the 19th of February, 1903, Vinita was the only recording district in the Northern District, and then each place of holding court on the 19th day of February, 1903, was made a recording district by itself and was described by metes and bounds in the Act.

Q. Was there any machinery provided by your office for the indexing and transfer of mortgages to the different recording districts?

A. No sir.

Q. Why?

A. Simply because the Act of Congress—There was no appropriation for it."

Upon being further interrogated on page 100 at the instance of the attorney for the appellee, he answers as follows:

"Q. Did you provide books for the purpose of recording and transferring at the various offices?

A. From the date of the recording act, February 19, 1913, each office was supplied with a full set of mortgage records and indexes for files."

And a little further on he testifies as follows:

"Q. Suppose a mortgage was recorded at Vinita, what was the method of procedure adopted by you in order to get that mortgage indexed at Pryor Creek?

A. I would get a written request from the mortgagee."

And a little further on he testifies as follows:

"Q. Tell us how many mortgages were on file

and recorded at (The stenographer has left the place out, but evidently it was Vinita, as this was the place he was clerk of at the time of taking the depositions), as shown by your records on February 19, 1903?

A. 7976 filed; 291 recorded.

Q. Was it possible for the clerk to ascertain and find out how many of these mortgages should be transferred to these various recording districts?

A. It is an impossibility."

Again on page 101:

"Q. According to your best information, knowledge and belief, how many mortgages were on file and recorded at Muskogee on July 1, 1912.

A. There has been between 80,000 and 100,000."

An inspection of the record will further show that the evidence in this case was taken and that as late as October 16, 1906, agreed statements of fact were filed. On page 112 thee was a stipulation signed by the attorney for the First National Bank of Vinita and the First National Bank of Claremore to the effect that the First National Bank of Claremore at the time it ran the attachment knew the state of the record at Muskogee in regard to the mortgage of the Vinita National Bank, and there is a further statement that the First National Bank of Vinita knew the state of the record as to the mortgage of the Vinita National Bank at the time it secured its mortgage introduced in the case. This agreement is there for what it is worth and speaks for itself, the agreement being as follows:

"First National Bank of Claremore, *Plaintiff.*

vs.

Wat Mayes, - - - *Defendant.*

Vinita National Bank et al., Intervenors.

STIPULATION AS TO FACTS.

It is hereby admitted by the plaintiff that it knew that the Vinita National Bank had its mortgage introduced in this cause, executed by Wat Mayes, on file, and the state of the record at Muskogee in regard thereto at the time it secured its order o fattachment in this case; and the First National Bank of Vinita, I. T. admits it knew the same facts at the time it secured the mortgage introduced by it in this case.

(Signed) W. H. KORNEGAY,

Attorney for First National Bank of Vinita, and First National Bank of Claremore."

On page 113 there is a stipulation signed by the First National Bank of Claremore with reference to the state of the record as regards the Keys mortgage when the attachment was run, the stipulation being as follows:

"In the United States Court in the Indian Territory, Northern District at Vinita, I. T.

First National Bank of Claremore, I. T.

vs.

Wat Mayes, - - - *Defendant.*

C. M. Keys et al, Intervenors.

STIPULATION.

It is stipulated between pltf. and intervenors, C. M. Keys & Co. & Stock Yards Bank, that at the time of running the attachment it was known to plaintiff that a mortgage was of record at Muskogee in favor of in-

tervenors calling for $34,800 & 3-100, which mortgage is in proof.

(Signed) FIRST NATIONAL BANK OF CLAREMORE,
By W. H. Kornegay, Atty.
Nev Campbell, R. F. Blair,
Attys. for Intervenors C. M. Keys & Co., & Stock Yards Bank.

Intervenors J. C. Hogan and Citizens Bank admit, each of them, knowledge of the existence of the above mentioned mortgage at the time of the execution of the mortgages to said intervenors, J. C. Hogan & Citizens Bank.

(Signed) J. HOWARD LANGLEY,
Atty. for Citizens Bank.
C. J. TAYLOR,
Atty. for Citizens Bank.
Nev. Campbell & R. F. Blair."

This record is silent as to the knowledge of the First National Bank of Vinita as to the C. M. Keys & Co. mortgage either at the time of getting its note from Wat Mayes or getting its mortgage.

The record in the case is silent upon date of the debts, except that the notes evidencing the debts were set out, and, in the absence of proof upon the point, the date of the original notes would presumptively be the time whe nthe debts were contracted. There is set out a copy of the note to the First National Bank of Claremore, which is dated January 8, 1903. There is set out the mortgage to the First National Bank of Vinita, and it shows that it was made on the 16th day of January, 1903, and secured one note dated October 6, 1902, and due in six months, and another dated Oc-

tober 12, 1902, and due in six months, though these notes, as shown later, were renewed and the First National Bank of Claremore's note was extended.

For the purpose of this discussion, then, it appears that the indebtedness of the First National Bank of Claremore, the attaching creditor, accrued on January 8, 1903, and the attachment thereon was run July 20, 1905, after extensions of the debt; that the indebtedness to the First National Bank of Vinita accrued, part October 6, 1902, and was for six months originally, and a part October 12, 1902, and was for six months originally, and that before the maturity of this paper, to-wit: on the 16th day of January, 1903, it took its mortgage; that the C. M. Keys & Co. mortgage was made on the 29th day of October, 1901, and matured in one month, as the note therein is described as maturing in a month, though, in fact, the note introduced in evidence matured i nsix months. That the law dividing the Northern District and designating Vinita as the place of recording instruments therein became operative May 27, 1902, and had been in operation, therefore, over four months before the debt to the First National Bank of Vinita was contracted and about eight month before the debt to the First National Bank of Claremore was contracted, and about eight months before the mortgage to the First National Bank of Vinita was made; that when the mortgage to

the First National Bank of Vinita was made the First National Bank of Vinita knew of the existence of the mortgage to the Vinita National Bank, but nowhere in this record is there any evidence that either the First National Bank of Vinita or the First National Bank of Claremore knew of the existence of any other mortgages in this case at the time the debt was contracted by Wat Mayes, the defendant.

In the body of the opinion it is stated that what caused the original plaintiff and the intervenors to attack the mortgages of C. M. Keys & Co. and the Vinita National Bank is that part of the Act of Congress which reads "but shall be transferred to the indexes without further cost." It is respectfully urged that while this appears to be sufficient reason for such attack, it is by no means the only one. The facts detailed in evidence and the findings below show that there was fraud in law, and that there was fraud in fact in the C. M. Keys & Co. mortgage, the fraud in law being based upon the failure to record in the district where the property was situate and in failure to take possession of the mortgaged property, and the fraud in fact arising from a failure to take possession of the mortgaged property, and from the fact that according to C. M. Keys & Co.'s own statement, the mortgage had been paid long before the attack was made on it, and because C. M. Keys & Co. were holding out to the world

through the medium of the record at Muskogee, that it had a lien upon the property of the defendant, Wat Mayes, for $34,000.00 and interest, whereas, in truth and in fact, the lien if it existed, had been paid off and discharged, and for the further reason that as shown by the pleadings themselves in this case and admitted by C. M. Keys & Co., its mortgage on its face was a fraud upon the foreclosure law of the United States in force in the Indian Territory, an dbecause it was further apparent from the pleadings of C. M. Keys & Co. and the admissions thereof that for about four years C. M. Keys & Co. had allowed Wat Mayes, the defendant in this case, to handle the cattle and derive several thousand dollars of the proceeds therefrom for his own use in the way of cash furnished him, as well as allowing him to appropriate several thousand dollars more to the satisfaction of other debts of Wat Mayes to C. M. Keys & Co. and to other parties, and by the further fact that the amount claimed on the trial itself was a general balance of account and not a balance of the original indebtedness secured by this mortgage, and for the further reason that the original property upon which the mortgage existed had practically all passed away and it was impossible to tell which cattle were under the mortgage and what increase belonged to C. M. Keys & Co. See pages 69 to 76 where the account claimed is stated.

The statement in effect is made in the opinion that it never occurred to the Clerk of the United States Court that it was not his duty to index the mortgages that were recorded or on file in his office without a request of the motgagee so to do, but it is believed that an inspection of the record will show that the Clerk claimed that it was not his duty so to do, without being requested by the mortgagee so to do, and it is now insisted that whether the Clerk claimed it or not, the mortgagee had a duty to perform in the premises, and that if the mortgagee failed to perform that duty he must suffer the consequences.

As a principle of law, it will be conceded that no man who is not at fault, either by laches or by commission, should be made to suffer as a result of the failure of a public official, but it is respectfully urged upo nthe attention of the Court that the case of Oats vs. Walls, 28 Arkansas 245, if it is to be used as an authority for the position to the effect that it was the duty of the Clerk of the Court to do the indexing, does not sustain the position and moreover has been overruled in the case of Turman vs. Bell 15 S. W. 886, by the court rendering it insofar as it would permit an inference being drawn therefrom that the mortgagee, C. M. Keys & Co., did not have a duty to perform in this case. In that case the court used the following language:

"The facts bearing upon the alleged notice by registry are that on the da ythe defeasance was executed—being about one month after the execution of the deed—Turman left it with the recorder of the county to be recorded, and it was then indorsed by the recorder as filed for record. Some time afterwards (the date cannot be definitely fixed from the proof) Turman called for the defeasance, and it was delivered to him by the recorder. It had not been recorded, and there was attached to it no certificate of the recorder that it had been. Subsequently, after having made a search of the records, which failed to discover the defeasance, the bank took its mortgage. It appears that the bank had no knowledge of the defeasance. Turman believed that it had been recorded, and did not discover his mistake until after the bank obtained its decree of foreclosure. Upon these facts it is contended that notice of the defeasance was given from the time it was filed for record. That contention is supported by the decision of this court in the case of Oats v. Walls, 28 Ark. 244; and, if it is to be followed without limitation, it is decisive of this case. In the opinion in that case the court used the following language: 'In this case Oats took his deed to the proper office, placed it in the hands of the person there in charge, and paid the fees for recording. This was all he was required to do; and an yacts thereafter to be done to perfect the record and make the notice full to all subsequent purchasers, etc., devolved upon the clerk, and could not operate to the prejudice of the mortgagee. That the holder of the deed has done all that is necessary under our registry laws to give notice of its contents when he files it for record, and that the subsequent misconduct or neglect of the recorder cannot prejudice his rights, is the established law. But, while such holder is exempt from prejudice by the misconduct or neglect of the clerk, we do not think the exemption should extend to his own acts that through design or negligence affect others. If A. should file a deed to be ecorded. and the recorder should so endorse it, and A. should immediately take it out of the office, it would not be

contended that such filing imparted any notice. Suppose that A., instead of taking the deed immediately after it is endorsed by the officer, should remain long enough in the office for the officer to record it, and should then take it out, knowing that it had not been recorded, would any one contend that such filing imparted notice to subsequent puchasers from A's grantor? If not, then if A. took the deed out of the recorder's office without knowing whether it had been recorded or not, and when he might have known by examining it for a recorder's certificate that it had not been recorded, can he insist that such filing imparts notice to subsequent bona fide puchasers? The statute requires, when a deed has been recorded, that the recorder attach to it a certificate of the fact of record. When the owner takes a deed from the recorder's office he can easily ascertain either that the certificate is or is not attached, and if it is not he has no right to conclude that the deed has been recorded, or to move it from file. If he remve his deed before it is recorded he places it in the power of the grantor to exhibit a clear title, and thus to mislead and deceive subsequent purchasers. By the exercise of slight care and caution he could have averted such a possibility, but, if he fails to do it, persons ignorant of the deed, who have examined the records, may be induced to purchase, when they have exhausted all usual means of inquiry and information. If they do thus purchase, a loss must be borne. Where should it fall? Upon him whose care and caution did not prevent it? or upon him whose slight care and caution would have pevented it? The question implies its own answer. The party whose negligence made the loss possible should bear it, and should be estopped to set up his prior right against the party without fault.

The doctrine of constuctive notice by registration rests upon the idea that all persons may learn and actually know that of which the law gives notice and implies knowledge; and it would contravene every principle of right and fair dealing to permit one to insist upon this constructive notice, and claim the benefit of

this implied knowledge, when his act had made such knowledge unattainable. We do not think the filing gave the bank notice of Turman's defeasance. These are our views after a careful and serious consideration of Oats v. Walls. The cases cited in suppot of that case have been examined and scrutinized by us, and do not conflict with the views herein expressed. In them it was held that where the holder of a deed filed it for record, and subsequent adverse interests were created before it was recorded, the notice was complete by the filing, but they were cases in which the failure to record was due to the delay of the recorder, the loss or destruction of the deed, or its abstraction from the files. In none of them did there enter the element of the owner's misconduct, either willful or negligent. In so far as that case holds that a deed is notice of its provisions from the time it is filed for record, and that the effect of such notice cannot be impaired by the misconduct of the officer, it is approved; but in so far as it holds that the notice continues as against those who in good faith and for value acquire adverse interests after the deed, unrecorded, and, without a certificate of record, is withdrawn from the files, it is overruled."

The doctrine of Case and Company vs. Hargadine in the 43rd Arkansas, 144, is as follows:

"A mortgage is filed, within the meaning of the statute, when it is delivered to the proper officer and b yhim received for the purpose of being recorded. The neglect of clerical duties by the recorder in making the proper indorsements, or in recording the intrument, does not affect the mortgagee. These are matters over which he has no control. His filing it is regarded as equivalent to registration, so far as he is concerned, and his rights will be protected though it be not recorded at all. The clerk is not his agent or servant for whose negligence he is responsible, but he is the officer designated by the law to perform the duties of receiving, filing and recording the instrument. It would be a harsh rule to punish an individual, who in

the prosecution of a right, has done everything that the law required him to do, for omission by a public officer to comply with forms prescribed to him as his duty. (Citing various authorities.)

The mortgagee left his mortgage in the proper office with the evident intention that it hsould be recorded. The clerk testified that he did not believe it to be necessary to record a chattel mortgage. He does not say, however, that he derived this impression from the conversation or conduct of the mortgagee. This makes the case very different from Bowen v. Fassett 38 Ark. 507, where the beneficiary of a trust deed left it in the recorder's office with the instructions not to record it."

Undoubtedly in the case at bar it was the pivilege of C. M. Keys & Co., if it so desired, not to have its Muskogee mortgage indexed at Vinita or at Pryor Creek. It was also its privilege not to record the mortgage at either place, if it so desired. It was also its privilege to have the mortgage re-recorded or indexed at Pryor Creek. It was also its privilege to have the mortgage re-recorded at Vinita, but it is not believed that the Clerk of the Cout had a right to re-record the instrument at Vinita unless requested so to do. It is not believed that the Clerk of the Court had a right to re-index the mortgage at Pryor Creek unless requested so to do by C. M. Keys & Co., for the reason that when a mortgage is over one year past due there is a presumption that some settlement has been had between the mortgagee and mortgagor; but when it is three years past due the presumption practically becomes a presumption of law as between the mortgagee and strangers.

The case of U. S. vs. Castillero, 2 Black, 1-95, is very long, and i fit is an authority bearing on this case it is to the effect that under a system of registration where the paper registered must be returned to the party owning it, that party must bear the consequences of its imperfections so far as registry is concerned.

The doctrine of Jones on Chattel Mortgages, par. 271-272, is that where the mortgagee has done his duty the neglect of the officer will not prejudice his right, but a reading of the sections both indicate, that the mortgagee must get the paper in the proper office and give proper directions. The idea, apparently, of the Court was that the Clerk of the Court was responsible for the Keys mortgage not being of record at Vinita, and also not being of record at Pryor Creek. In the opinion the testimony of Witness Davidson is referred to as showing the reason why Davidson was derelict in his duty, i. e., the want of an appropriation. The other parts of his testimony bearing on thi sare set out above and comment is useless as they carry their own explanation the moment attention is directed to them. Let us examine and see if this federal official was in any way derelict in any duty he owed C. M. Keys & Co. as shown by this recod. May 27, 1902, Congress said to C. M. Keys & Co. that the recording office at Vinita was the place to give notice of the mortgage if the mortgagee saw fit to allow the mort-

gagor to remain in possession; in other words if a mortgagee desired to let the mortgagor residing in the Vinita district hold the mortgaged property without its being subject to attack by creditors of the mortgagor then the mortgagee must give notice at Vinita. According to Davidson's testimony, from July 1, 1902, on, facilities were afforded at Vinita for such recording. Had the trouble arisen prior to the time the books and offices were open, it would be altogether a different proposition. This was a recorded instrument, the origina lbeing in the hands of Stock Yards Bank.

Did Davidson owe the duty to C. M. Keys & Co. of searching the records at Muskogee for unsatisfied mortgages in their favor and then recording from the records at Muskogee the instrument at Vinita? It is not believed that any fair minded person would contend that Davidson owed any such duty to C. M. Keys & Co. in July, 1902. Did Davidson owe a duty to C. M. Keys & Co., in February, 1903? If so, what was that duty? Was it the business of Davidson to search all the Vinita records and distinguish which mortgages were on propety located at the time of making the mortgages, or at that time, in each of the twenty-five recording districts of the Indian Territory? It is not believed that it can be successfully contended that such was his duty, even though the mortgage had been re-recorded at Vinita or had been filed there or indexed

there, none of which was done. It certainly appears that in this case no one can justly contend that the witness Davidson did not do his duty by C. M. Keys & Co. Neither does it appear that any excuse he might offer generally for his not indexing at Pryor Creek that which was o frecord at Vinita, should be held decisive or persuasive in a case where the record to be indexed was not in his bailwick. As well might we argue that it was Davidson's duty to transfer to the Pryor Creek index a mortgage at Ardmore or South McAlester. Unde these conditions it does not seem to the writer of this brief that the language of the opinion concerning Davidson, as follows:

"We do not believe the above objections to be insuperable barriers to the performance of the duties required of the recorder by the Act of Congrss, and such excuse for non-performance was not urged by him as a reason for non-performance. In answer to a question put to him at the trial as to why he had not transferred all such mortgages to the indexes, he answered: 'Simply because the Act of Congress—there was no appropriation for it.' And that was probably the real reason why it was not done; that it was not his duty to have done so seems neve rto have occurred to him. It is a universal rule that omissions by a publif officer in the mode of complying with forms prescribed to him by the law as his duty, are not pemitted to affect other parties who are not in fault."

is an accurate statement of the law as to his duties under the facts as given by the record. In the opinion as rendered it is claimed that Wade on Notice, Section 195, and Melton vs. Turner, 38 Texas, 81, seem to be

decisive of the proposition that when Vinita was made the recording place for the Northern District, and the statute did not make provision for re-recording at Vinita, that it was not necessary so to do. The following is quoted fom Wade on Notice:

"When a deed is deposited for record in the office of the recorder of the county in which the land is located at the time, and by a subsequent subdivision the land falls within the boundaries of another county, such change will not affect the validity of the registration." Wade on Notice, Sec. 195.

The following is quoted from Melton vs. Turner.

"The record of a deed in a county where the land lies though upon subdivision of the county subsequent to the record of the deed, the land may fall within the new subdivision, is notice to purchasers."

An inspection of the volume of Wade on Notice in the State Library shows that Melton vs. Turner is cited as sustaining the doctrine of the text. An examination of Melton vs. Turner shows that, if cited for the purpose of sustaining the position that a chattel mortgage once recorded in a county is notice indefinitely in any subsequent subdivision, it falls far short of so doing. It is apparent that when a purchaser deals with land he is bound to know that it has always been stationary, in fact, all location of things is based on the idea that land is stationary, and when a person deals with land knowledge is imputed to him of the governments and subdivisions of government, and the territorial limits of the government sand subdivisions

of government theretofore embracing the land. Not so with chattels and especially cattle, which by nature are not fixed. It is not deemed necessary to look for authorities on this point. It is believed that the courts, without poof, know judicially all the changes in the boundaries of counties and the times, and that in dealing with lands they require individuals to know all they know and more; in other words, courts say individuals are put on inquiry and know everything inquiry would develop, where geographical facts are before them. See Wigmore on Evidence, par. 2575-2580.

An examination of the Texas case will show that it was not a case similar in any respect to the one at bar or from the decision of which any light can be thrown upon the point in question. The point here involved, among others, is whether or not a recording of a mortgage on cattle in a district where the mortgagor resides, is sufficient to authorize the mortgagee to refrain from taking possession for over three years after the district in which the mortgagor resides has been cut off from the original district, and whether after the law has changed the place of record so that the location of the property is the standard, the mortgagee can for two years and a half hold a past due mortgage, and not take possession or record in the district where the property by operation of law has been placed, and still have a lien as against creditors on property, a

large part of which never existed at the time of the changes in the law as to the place of record. In the Texas case, from the meager statements therein contained, a party was sued for possession of land. He relied, among other things, on the statute of limitations as a defense, and it appears that the defendant's grantor had purchased at administrator's sale a land certificate under a decree of the court having jurisdiction of the administration; subsequently a patent was issued for the land, which was located in another county after the division fom that in which the sale was had, and the defendant had occupied the land for ten years prior t othe beginning of the suit claiming it as his own under the patent and unde the sale of the certificate. The point was raised that the sale of the certificate was void, but the Court held it was personal property and could be sold by the administrator. Then the question of ten year limitation was raised. The higher court held, that the party in possession could show good faith by referring to the proceeding in another county from that in which the land lay, and under which he claimed a right, an entirely different proposition from the one here involved. In the present case it was movable property, and was in possession, not of one of the adverse claimants but a third party, while in the Texas case it was land in possession of defendant and it was a question of the kind of posses-

sion defendant had, whether in good faith and adverse to plaintiff. It is believed by the writer that the cases relied on as decisive are not so and that a review of the statutes and an analysis of them in the light of the federal decisions and the Arkansas decisions, will lead to a practical solution of the problems. If the law and conclusion reached by the court in the opinion is corect, it necessarily follows that at the present time before a person could safely take a mortgage on cattle located in Mayes County, Oklahoma, he must search the records, both filed and recorded, during all the time the recorder's office for that portion of the country was located at Muskogee, and he must also do the same at Vinita, and also at Pryor Creek. Section 8 of the Schedule to the Constitution is as follows:

"All judgments and records of deeds, mortgages, liens, and other instruments, filed or recorded, affecting the title to real and personal property in the Indian Territory and Osage Indian Reservation, are hereby made as effectual to impart notice and for all other purposes under the laws of the Territory of Oklahoma extended in force in the State, as they were under the laws heretofore in force in the Indian Territory and Osage Indian Reservation."

Section 9 is as follows:

"All judgments and records of deeds, mortgages, liens, and other instruments, filed or recorded, affecting title to real and personal property in new counties that have been created out of the territory of any county or counties of the Territory of Oklahoma and of any recording district or districts of the Indian Territory, are hereby made as effectual to impart notice

and for all other purposes under the laws of the Territory of Oklahoma, extended in force in the State, as the same would have been as if no changes had been made by the provisions of this Constitution in the boundaries of the counties as they existed in the Territory of Oklahoma, or of the boundaries of the recording districts as they existed in the Indian Territory."

Under these provisions, there will never be any end to the rights of mortgages, if C. M. Keys & Co., under the law could keep alive their mortgage under this record up to July, 1905, as there was no change in the chattel mortgage law after that time till the Schedule to the Constitution became effective. The Constitutional Convention evidently thought that where counties were subdivided it was necessary to provide that there should not be a necessity to re-record instruments. But it does not stop under this decision with the original cattle; it goes on and on, as the evidence in this case showed very few of the original cattle were there when the attachment was run, and it was the increase and additions that were attached. If it was good then on the increase, why not continue generation after generation? Is not this the logical effect of the decision of the Court as rendered when applied to other cases?

The Act of May 27th, 1902, did not say in express words that it was necessary in order to keep chattel mortgages in full force as against creditors, to re-record the mortgage in the recorder's office provided for

the Northern District at Vinita in case the mortgagor resided in the then Northern District, but it did say that the Clerk's Office at Vinita should be the recorder's office for the Northern District, and of course that carried with it the idea of its being the place in which instruments requiring record should be entered or filed. The language is as follows:

"That the clerk's office at Vinita shall also be the recorder's office for the Northern District, except that the clerk's office at Miami shall continue to be the recording office for the Quapaw Indian Agency as now provided by law."

There was one exception, and only one, to the recorder proposition, which is contained in the latter part "*except that the clerk's office at Miami shall continue to be the recoding office for the Quapaw Indian Agency as now provided by law.*" How was this now provided by law? By reference to Vol. 29 Statutes at Large, page 330, we find the following:

"That all deeds and instruments of writing pertaining to real estate within the Quapaw Agency and the town of Miami, in the Indian Territory, shall be recorded at the said town of Miami by the clerk of the United States court in and for the northern district of the Indian Territory, or his duly appointed deputy, in a book or books kept for the purpose, and sections six hundred and sixty-nine, six hundred and seventy, and six hundred and seventy-one of chapter twenty-seven of Mansfield's Digest of the Laws of Arkansas covering deeds, mortgages, liens, and instruments of writing pertaining to real estate, are hereby extended over and put in force in said Quapaw Agency, Indian Territory."

By reference to Vol. 31, Statutes at Large, page 229, we find the following:

"That thereafter all chattel mortgages executed in the Quapaw Agency in the northern district of the Indian Territory shall be recorded in the town of Miami by the clerk of the said northern district of the Indian Territory, or his duly appointed deputy, in a book or books kept for the purpose."

By reference to Vol. 30, Statutes at Large, page 932, we find the following:

"That all chattel mortgages executed in the Quapaw Agency in the northern district of the Indian Territory shall be recorded in the town of Miami by the clerk of the said northern district of the Indian Territory, or his duly appointed deputy, in a book or books kept for the purpose."

It is a rule of statutory construction that the expression of the one thing is the exclusion of the other, in fact, it is a maxim of statutory construction. See Black on Interpretation of Laws, page 146. If this be a rule of construction, and it is but one of the ordinary rules of every-day life as to what language means, is the conclusion not inevitable that all chattel mortgages on property of residents of the then Northern District must, with reference to third parties thereafter acquiring rights or liens, be of record at Vinita? Should there be two exceptions when Congress only made one? Clearly, if a mortgage executed prior to the division and of record at Muskogee, should continue to impart notice indefinitely, the Clerk's office at Vinita was not

the recorder's office for the Northern District, with the exception of the Quapaw Agency as defined by the Act, as Muskogee would continue to be a recording office for the purpose of renewals and perpetuations, and the use of the defining word "the" immediately becomes useless and it by construction carries the meaning ordinarily carried by the word "a." It is believed by the writer that when Congress designated the Clerk's office at Vinita as the recorder's office for the Northern District, except the Quapaw Agency, it meant what it said, and that if Congress had meant that there should be other exceptions it would have referred to them. It is not believed that the rules of construction of language changed so radically between May 27, 1902, and February, 1903, that it can be safely said that in May, 1902, Congress by saying nothing in exact language on the subject of re-recording at Vinita, though it used the term "the recorder's office," meant to say that Muskogee shauld continue to be the recorder's office for all instruments theretofore filed or recorded affecting property in the Northern District as defined by the Act, in view of the fact that it used the word "continue" when it referred to Miami, and that it did not refer to Muskogee at all, and in view of the furthe fact that in February, 1903, Congress by express provision said that on the second division it should not be necessary to re-record at full length, but

it was only necessary to transfer to the indexes. Is this itself not a legislative declaration to the effect that if there was not an express provision on the subject, there would have been a necessity to record in the new district? Is not the provision of the Schedule a legislative declaration of the highest order; that as construed by the Constitutional Convention when the counties and districts were divided it required a special saving clause to obviate the necessity of recording mortgages again. What did Congress mean by the term "recorder's office?" Its ordinary meaning is probably the meaning Congress intended. Bouvier defines the word Recorder as "An officer appointed to make record or enrollment of deeds and other legal instruments authorized by law to be recorded." Congress had theretofore defined the term Recorder in the Act of May 2, 1890, as follows:

"They shall also be ex-officio recorders within their respective djvisions and as such they shall perform such duties as are required of recorders of deeds under the said laws of Arkansas and receive the fees and compensation therefor which are provided in said laws of Arkansas for like service."

By Section 3243 of Mansfield's Digest the recorder was allowed for recording, indexing and cross-indexing for each hundred words ten cents, and by Section 3244 it was provided as follows:

"No recorder shall be required to indorse any instrument presented to him for record as filed, or to

record the same, unless the fees for recording and the tax thereon, if any, be first tendered to him; nor shall any recorder be subject to any action or liable in any manner, unless such fees shall be first tendered, for a failure or refusal to record any such instrument."

The duties of the recorder were more explicitly defined by the various sections of Mansfield's Digest. Section 5558 makes it his duty to record the instruments properly proven or acknowledged and authorized to be recorded in his office. Section 5563 provides for making an index of real estate instruments, and Section 5565 provides for an index of chattel instruments, of marriages, bonds, etc. Section 5560 provides for a book showing the receipt of instruments. By reference to the sections defining the duties of recorders, we find that there is a duty prescribed for the holders. Section 5560, in referring to the instruments uses the word "deposited." Section 5561 uses the word "delivered" and makes it his duty to record in the order and as of the time of delivery. Section 5562 says everything is considered as recorded from the time it was "delivered" and requires the recorder to certify when he "received" it. Section 5567 provides a penalty for neglecting and refusing to record what was "delivered" and "received" and for recording any deed or instrument before another deposited in his office and entitled to record, and provides for damages to the party injured.

It will be seen, therefore, that there were duties put upon the recorder under the law, and there were duties put on the holder under the law already in existence, which duties were statutory. The duty of the officer was to put the instrument on record on tender of the instrument properly acknowledged and the fees for so doing. It was the duty of the holder to first request the record, secondly to put it in the power of the officer to make the record, and thirdly to tender the fees for so doing. An examination of Mansfield's Digest on the subject will show all this to have been crystallized into statutory form at the time of the passage of the Act of February, 1903. How much of a modification of the statute law defining the relative duties of the party desiring the record made and the officer required to make it was superseded by this act? The Act nowhere relieves the person desiring the record of the duty to request such record, and it does undertake to relieve him of the necessity of paying the expenses of again recording, but does it undertake to relieve him of the expense of indexing?

An analysis of the Act of February, 1903, in the light of existing statutes on the subject, in the judgment of the writer will show that Congress by this Act provided that the expense necessary to index should be borne by the holder, but that he should get the benefit of full recording thereby without having to pay full

fees as for a recording, but should pay the fees for indexing and no more. It was immaterial with the clerk whether he received pay for this service or not, inasmuch as he was practically on a limited fee system and the fees amounted to more than he was pemitted to receive, and the fact that he indexed the mortgages when requested and did not charge for the same is not by any means decisive of what the law was on the subject. If, as a matter of fact, Congress did not by the Act require the clerk to search for mortgages and to transfer without a request, then C. M. Keys & Co. have been guilty of negligence. On the other hand, if Congress required that there should be a fee for indexing, necessarily C. M. Keys & Co. were required to pay it. This Court ,prior to the time the opinion in this case was rendered by Justice Kane, had rendered an opinion through Justice Hays that decided some of the questions involved in this discussion, though no reference was made in the briefs thereto for the reason that the briefs were written before the decision. The case is Fritz vs. Brown, 95 Pac. 437. In this case the Court holds that the Act of Congress of February, 1903, repealed the provision on the subject of recording chattel mortgages in the District of the mortgagor's residence by substituting a provision that the recording place should be in the district where the property is located. The language of the Act is as follows:

"It shall be the duty o feach clerk or deputy clerk of such court to record in the books provided for his office all deeds, mortgages, deeds of trust, bonds, leases, covenants, defeasances, bills of sale, and other instruments of writing of or concerning lands, tenements, goods, or chattels; and where such instruments are for a period of time limited on the face of the instrument they shall be filed and indexed, if desired by the holder thereof, and such filing for the peiod of twelve months fro mthe filing thereof shall have the same effect in law as if recorded at length. The fees for filing, indexing, and cross-indexing such instruments shall be twenty-five cents, and for recording shall be as set forth in section thirty-two hundred and forty-three of Mansfield's Digest of eighteen hundred and eighty-four.

That the said clerk or deputy clerk of such court shall receive as compensation as such ex-officio recorder for his district all fees received by him for recording instruments provided for in this Act, amounting to one thousand eight hundred dollars per annum or less; and all fees so received by him as aforesaid amounting to more than the sum of one thousand eight hundred dollars per annum shall be accounted to the Department of Justice, to be applied to the permanent school fund of the district in which said court is located.

Such instruments heretofore recorded with the clerk of any United States court in Indian Territory shall not be required to be again recorded under this provision, but shall be transferred to the indexes without further cost, and such records heretofore made shall be of full force and effect, the same as if made under this statute.

That wherever in said chapter the word 'county' occurs there shall be substituted therefor the word 'district,' and wherever the words 'State' or 'State of Arkansas' occur there shall be substituted therefor words 'Indian Territory,' and wherever the words 'clerk' or 'recorder' occur there shall be substituted

the words 'clerk or deputy clerk of the United States court.'

All acknowledgments of deeds of conveyance taken within the Indian Territory shall be taken before a clerk or deputy clerk of any of the courts in said Territory, a United States commissioner, or a notary public appointed in and for said Territory.

All instruments of writing the filing of which is provided for by law shall be recorded or filed in the office of the clerk or deputy clerk at the place of holding court in the recording district where said property may be located, and which sai drecording districts are bounded as follows: * * * "

Which is followed by a description of the Fifth Recording District. The decision further holds that deeds and mortgages should be acknowledged as before. The decision further holds that the effect of the Act was to enlarge the class of instruments that could be filed so as to embrace real estate contracts when limited on their face as to time, and it holds that sections 4750 and 4751 remain in force as modified. The Court further holds that there was not a substitution, and the Court uses the following language:

"It cannot be safely contended that said act of Congress repeals said chapter 110, on 'Mortgages,' by substitution, for the reason that, to effect repeal by substitution, the latter act must cover the whole subject-matter of the earlier one, and must plainly show that it was intended to be substituted for the earlier act. A mere similarity in their provisions, or in some of their provisions, is not sufficient to effect a repeal. State v. Ogden, 50 La. Ann. 982, 24 South. 593, Adams v. People, 25 Colo. 532, 55 Pac. 806. Said chapter 110, on 'Mortgages,' provides how mortgages shall be proved and acknowledged; what mortgages shall be

entitled to be recorded, the effect of recording the same; and when the same shall become a lien; provides how acknowledgment of satisfaction of a mortgage shall be made; that mortgages upon future crops may be made; provides not only what mortgages may be filed and not recorded, but the manner in which the request for such filing shall be made; that the filing may be extended, and the manner of extending the same; how such mortgages filed may be used as evidence in the trial of cases; and in detail the kind of records the recorder shall keep, and the character of entries that shall be made therein at the time each instrument is filed; what the effect of giving a mortgage shall have upon the right of possession to the property when the property mortgaged is personal property; how filed mortgages may be cancelled; how sales may be made under mortgages, and under what conditions the right of appraisement and redemption may be waived. An examination of the act of Congress of February 19, 1903, discloses that very few, if any, of these subjects provided for in said chapter 110 are covered by said act. We therefore conclude that such act is cumulative of said chapter on motgages in so far as it affects the subject-matter therein covered, and does not have the effect of repealing said chapter by substitution, and that only such parts of said chapter on mortgages as are repugnant to or in conflict with said act are repealed thereby."

The point was raised in the case that a renewal affidavit would have to be marked with directions to file and the Court overruled that. A point was made on the form of the renewal affidavit, and the Court held the renewal bad. In the case no point as indicated was made as to whether the Act of 1903 limited the life of a filed mortgage to one year, and after said time its record period could not be extended. This decision, how-

ever, in its effect holds that the old laws were not substituted by the new, but merely modified. Section 4735 of Mansfield's Digest provided for a record of filed mortgages to be kept, and also an index. Section 4756 provided a fee of twenty-five cents for filing each instrument and entering upon the record provided for in the Act of the Arkansas Legislature in 1877. The Act of Congress specifically refers to another section of the Arkansas Statutes, viz: 3243, a section prescribing the fees of recorders for instruments recorded but not left with the recorder, which allowed a fee of ten cents per hundred words for recording, indexing and cross-indexing. So that we have this situation, when the instrument was actually filed a fee of twenty-five cents would cover the filing, indexing and cross-indexing, where the instrument was recorded and indexed and cross-indexed at the rate of ten cents a hundred words, or, to ue the language of the Act of 1903, "transferred to the indexes," a fee of ten cents per hundred words for this, and no more. Of course, the matter depends upon what i smeant by the term *further cost*. If Congress had meant to provide that nothing should be demandable by anyone of the holder for transferring to the indexes, why not use the words *without cost?* Would not this have plainly expressed the idea that the transfer should not cost anybody anything? In fact, if this Court desired to convey the idea of a trans-

fer for whic hthere would be no charge, would it select the words *"without further cost"* when by leaving out the word *"further"* the idea would be far more clearly expressed? We speak of the *cost* of an article, as contradistinguished from the word *expense*, which we generally use in referring to the purchaser. See Worcester's Dictionary.

When we take up other parts of the law, and we look to the words used by Congress, there is not anything to indicate that Congress intended this work to be free. Section 3244 of Mansfield's Digest was left intact, which is as follows:

"No recorder shall be required to indorse any instrument presented to him for record as filed, or to record the same, unless the fees for recording and the tax theeron, if any, be first tendered to him; nor shall any recorder be subject to any action or liable in any manner, unless such fees shall be first tendered, for a failure or refusal to record any such instrument."

The word *cost* evidently refers to the cost of transferring to the indexes, in view of the law permitting the clerk to charge for same as found in Sec. 3243, and the word *further*, under all rules of construction, undoubtedly refers to that which immediately precedes rather than that which is more remote especially when by giving it a reference to that which is more remote we absolutely eliminate the necessity for the qualification. See Black on Interpretation of Laws, page 150, where the author uses the following language:

"If there is difficulty in interpreting the qualifying words of a sentence, the rule is to apply the relatives 'which,' 'said,' and other relative or limiting words or phrases, to such terms or clauses as shall immediately precede them, rather than to such as are more remote."

Besides this, if the construction to the effect that the person getting the benefit of the transfer is not to pay for it is adopted, immediately the word *further* adds nothing to the requirements or regulations intended to be made effective, and it is likewise a familiar rule that all words are to be taken into the account. See Black on Interpretation of Laws, page 83, where the author uses the following language:

"In giving construction to a statute, the courts are bound, if it be possible, to give effect to all its several parts. No sentence, clause, or word should be construed as unmeaning and surplusage, if a construction can be legitimately found which will give force to and preserve all the words of the statute. 'It is a canon of construction that, if it be possible, effect must be given to every word of an act of parliament, but that if there be a word or phrase therein to which no sensible meaning can be given, it must be eliminated.' "

Another principle applicable would be that to give the construction that there should be no charge is to repeal by implication Section 3244 and to modify Section 3243, which is expressly continued by the Act. Another reason why it should not be held that the holder of a past due mortgage was free from the burden of paying for the indexing is that section 4754 of the statute, as follows:

"In the absence of stipulations to the contrary, the mortgagee o fpersonal property shall have the legal title thereto and the right to possession."

was in no way modified, and in the present case the stipulations were for possession of the mortgagor only until default, and possession thereafter in the mortgagor was in the face of the statute and the privilege of keeping this condition against the statute continued could only be by registration in the district where the property was located after February, 1903. As stated by the Supreme Court of Idaho in Lewiston National Bank vs. Martin, 23 Pacific 921, the doctrine is as follows:

"The recording act was simply intended to serve as a substitute for possession on the part of the mortgagee. It was formulated in response to the necessities o fthe commercial world, and to extend and multiply the sources of security for business purposes. Being simply a substitute for possession, (and it was never claimed to be anything more), it will not cover any stipulation that might, and doubtless would in many instances, be resorted to as a shield to protect fraudulent transactions or defeat honest creditors."

It will thus be seen that under the recording acts, if the mortgagee after default desired to allow the mortgagor to keep possession, he must register his mortgage or as against creditors lose his lien, and under these circumstances is it not fair to presume that Congress intended that he should pay for the registration, which was primarily for the purpose of saving the mortgagee the trouble and inconvenience of taking

possession in order to prevent the mortgage being void as against creditors of the mortgagor? But there is another reason apparent on the face of the Act: By treaties with the various Indian tribes, statehood had practicaly been arranged for at this time, and the question of school funds was being considered, and Congress, recognizing the necessity, inserted the clause as follows:

"That the said clerk or deputy clerk of such court shall receive as compensation as such ex-officio recorder for his district all fees received by him for recording instruments provided for in this Act amounting to one thousand eight hundred dollars per annum or less; and all fees so received by him as aforesaid amounting to more than the sum of one thousand eight hundred dollars per annum shall be accounted to the Department of Justice, to be applied to the permanent school fund of the district in which said court is located."

Of coarse the word *recording* as there used covers filing, indexing and cross-indexing. Is there any reason for believing that as between a mortgagee who desired to hold a mortgage on chattels and permit the mortgagor to remain in possession clothed with the evidence of ownership, and a permanent school fund, Congress would favor the mortgagee? On the other hand, is not the presumption the other way? So then the question becomes pertinent, is there any reason for holding, under these conditions, that it was the duty of the clerk to transfer to the indexes without request? Is there any reason for holding that the clerk

shoul dtransfer without pay? Is there any reason for holding that Congress favored the mortgagee over the children to be educated later by the permanent school fund? If the mortgagee was under obligation to pay, his failure to pay must be attributable to him, not to the clerk. Again, is there any room to construe the following section:

"All instruments of writing the filing of which is provided for by law shall be recorded or filed in the office of the clerk or deputy clerk at the place of holding court in the recording district where said property may be located, and which said recoding districts are bounded as follows: * * * "

as permitting the mortgagee to delay indefinitely about giving notice of his mortgage under the new law in the district where the property was located? In fact is not this change in the law one of the reasons for the transfer to the indexes? Suppose it should be argued that once recorded, always recorded. Is not the registration law a law for the benefit and protection of the mortgagee? Does not the mortgagee have the option of taking possession or giving notice in the manner prescribed by law? Is not the law that as between others occupying the relation of creditors of the mortgagor and the mortgagee the mortgagee's duty is a continuing one, either to take possession or record where the property is located? Is not the mortgagor's security by operation of law as against creditors, independent of the registration law, invalid unaccompan-

ied by possession? The law books practically so hold, from the time of Twyne's case to the present. This principle has been so far crystallized into statute in this jurisdiction as to preclude the doctrine of actual notice. See Carnall vs. Duvall, 22 Ark. 136. In fact, this proposition, to the knowledge of the writer, so far as Indian Territory is concerned, was never questioned till the argument on the rehearing in this case, but inasmuch as it was questioned it is deemed necessary, though with apology for so doing, to cite the cases of Main vs. Alexander, 9 Ark., 112; Jacoway vs. Gault, 20 Ark. 190; Hannah vs. Carrington, 18 Ark. 105; Dodd vs. Parker, 40 Ark. 536; Fry vs. Martin, 33 Ark. 203—cases decided before the adoption of the law, and Fritz vs. Brown, heretofore referred to. The argument may, perhaps, be advanced that inasmuch as the clerk is the one to do the work of indexing, theferore the lien holder has no duty to perform. One might as well to say that because the clerk must record, therefore there is no duty on the lien holder, but everybody knows he must pay the fees therefor and request. The same argument will apply to filing. Again, the argument may be made that because Section 4743 provides for an instrument being a lien from the time of filing and not before, that therefore the converse is true, i. e., that it shall continue to be a lien, but it is respectfully insisted that there are various ways that the mortgage

may cease to be a lien, and Section 4751 is explicit as to one way a filed mortgage ceases.

It is conceded that on this record all the debts in their inception were due and owing by Wat Mayes. It is further conceded on this record that at the time of trial Wat Mayes owed the amount of the debts as found by the Master. It is not conceded on this record that as against First National Bank of Vinita or Claremore C. M. Keys & Co. had a lien on the attached cattle when the attachment proceedings were had, and it is claimed that the condition of the record at Muskogee is a badge of fraud as against the Keys mortgage, for the reason that if it is to be relied on it was false and misleading, and for the further reason that it was a lien that had already been satisfied. On its face it was a thirty day mortgage, while the debt in evidence was a six months debt, and this was the only note relied on. It must be remembered that the face of the mortgage, if the Muskogee registration is notice, is the standard of the rights. There is no questio nof a renewal, so far as the record goes. It may be claimed that the one month proposition is a mistake and parol evidence can be offered to explain the mistake. Can this be done as against third parties? The mortgage, by virtue of the misdescription, becomes a different instrument, as its maturity is made to depend on the maturity of the note. Di dthe mortgage in evidence secure the $34,-

000 note in evidence? As between mortgagor and mortgagee, yes; as between creditors who acquired liens, no.

Jones on Chattel Mortgages, Section 22, says:

"A mortgage which gives a totally false description of the note intended to be secured cannot be relied upon in an action at law. The mortgagee should first proceed in equity to reform the mortgage. Although the mortgage be made wrong by mistake, the parties are bound by it unless they take some appropriate means of correcting the mistake. The proper way is not to prove the mistake in an action at law, and have the same benefit that might be ahd of a reformed instrument; but to bring an action to reform the mortgage so that it can have its proper legal effect."

And also:

"A mortgage conditioned to secure two notes particularly described by their amounts and dates does not secure the payment of two notes of the mortgagor, held by the mortgagee for wholly different sums and with different dates. Yet if the note produced be clearly shown to be a renewal of the note described in the mortgage, the variance thus explained does not invalidate the security."

Under these authorities it can be shown that it is a renewal note that the debt is evidenced by, but can it be shown that there was a mistake in the maturity of the note undertaken to be described, or is the mortgagee bound by the mistake and merely has an equity to correct, which was lost by *laches* in seeking to correct? See Jones on Chattel Mortgages, Section 273, as follows:

"A mistake in spreading a mortgage upon the rec-

ord may invalidate it as notice; although a mistake which would be material in one instance might be immaterial in another. Ordinarily a mistake in recording the date of the mortgage, such as recording the date as of an earlier year or earlier month, would not, perhaps, invalidate the record. But where a mortgage was made of ship-building materials, and the mortgagee afterwards claimed a vessel under the mortgage as built of such materials, a mistake in recording the date of the mortgage as made six months earlier than the actual date of it was held to render the record of the mortgage ineffectual as against attaching creditors of the mortgagor.

An error of the register in indexing a mortgage does not invalidate the record, although a subsequent purchaser is thereby misled."

See Cobbey on Chattel Mortgages, paragraph 133 as follows:

"MORTGAGES MAY BE REFORMED SO AS TO COVER THE DEBT INTENDED TO BE SECURED.

The security afforded by a mortgage cannot be extended to cover other debts than those set forth and described in the instrument itself; but where the rights of third parties have not intervened, and there is an actual indebtedness secured by the mortgage, the mortgagee, in a proper case, may have the mortgage reformed so as to cover the indebtedness intended to be covered by it."

Was the instrument a mortgage at all, even if the debt mentioned existed? On its face, it has practically as many elements of an assignment as it has of a mortgage. See Marshall vs. Livingston National Bank, 28 Pacific 312, and Box vs. Goodbar, 14 S. W. 925, and Penzel vs. Jett, 16 S. W. 120.

It will be observed that this mortgage calls for

the increase, but is silent as to what increase, i. e., whether it is the increase then conceived or to be conceived. It will be further observed that the marketing of the cattle are provided for, and they are to be consigned to the mortgagee.

Where the increase is mortgaged by a mortgage maturing in thirty days, and it is provided that the cattle when marketed shall be consigned, and that a commission shall be secured by the mortgage, can one say that it was in contemplation of the parties that the idea of security is uppermost? It is not the case of a conveyance for the purpose of sale, and for the purpose of earning commissions for the sale? Again, if this was a mortgage, and it secured commissions, which on its face it does, would not Section 4763 of Mansfield's Digest, as follows:

"The mortgagor or grantor in any mortgage or deed of trust, where the sole consideration of the mortgage or deed of trust is money loaned to the mortgagor shall, if he so desire, have the right to waive any or all rigst of appraisement, sale or redemption provided for in this act, by a clause in said mortgage or deed of trust to that effect."

invalidate that portion of the supposed mortgage providing for sale without notice or appraisement? The instrument, so far as it provides for sale, provides as follows:

"When marketed said cattle are to be shipped and consigned for sale to C. M. Keys & Co., at the Stock Yards at Nat. Stock Yds., Ill., and when sold the pro-

ceeds thereof shall be applied first in payment of the usual customary commissions to said C. M. Keys & Co. for selling the same, and the balance, or so much thereof as may be necessary, shall be applied on the indebtedness hereinafter described. If said cattle or any part thereof be consigned or sold elsewhere than above, then said mortgagee shall be paid a commission of 50 cents per head on all the above described cattle."

And the avoiding part is as follows:

"Provided always, and these presents are upon thi sexpress condition, that if said party of the first part shall pay or cause to be paid unto the said party of the second part, its successors, or assigns, the commissions heretofore stated and agreed upon and the aforesaid sum of Thirty Four Thousand Eight Hundred and 04-100 Dollars ($34,800.04), according to the terms of one certain promissory note of even date herewith, executed by Wat Mayes to the order of C. M. Kays & Co., and payable as follows:

One note for $34,800.04, dated Oct. 28, 1901, payable one month after date all payable at the office of C. M. Keys & Co., Nat. Stock Yd., Ill., and all with interest thereon at the rate of eight per cent per annum from date or according to the terms of any renewal or extension of said note which may be made by consent of said second party, its successors or assigns, and may be evidenced by the execution of new note or notes in place of said original note at or after maturity, for the amount of the debt then unpaid and any renewals or extensions thereof, and which said note the party of the first part hereby agrees to pay on maturity thereof, then these presents and everything herein contained shall be void, anything herein contained to the contrary notwithstanding."

And the foreclosing part is as follows:

"And it is hereby mutually covenanted and agreed between the parties hereto, that if default be made in payment of said sum of money, or any part thereof, or the interest thereon, according to the tenor and effect

of said note, when the same becomes due and payable, or upon a failure to conform or to comply with any of the conditions and agreements herein mentioned, then the whole su mof money hereby secured shall, at the option of the party of the second part or the legal holder or holders of said note or notes, becomes due and payable at once, without notice. And it is further agreed that in case of sale or disposal, or attempt to sell or dispose of the goods and chattels hereby mortgaged, or a removal of, or attempt to remove, the same from the premises aforesaid, or an unreasonable depreciation in value, or if from any other cause the security shall become inadequate, or the party of the econd part shall deem itself insecure at any time before said indebtedness is fully paid, whether the same be due or not, then and thenceforth it shall be lawful for the said party of the second part, its successors or assigns, or its authorized agent, to enter upon the premises of the said party of the first part, or any other place or places wherein said goods and chattels and chattels or live stock aforesaid may be, to remove and dispose of the same as aforesaid, without resort to law, and without appraisement or notice (all right of redemption, appraisement and notice of foreclosure required by law being hereby expressly waived), and all the equity of redemption of the said party of the first part, at public auction or private sale, to the person or persons, who shall pay the highest price for the same, and out of the avails thereof to retain the full amount of said obligation, with the interest thereon, according to the conditions thereof, together with all the reasonable costs and expenses attending the same, and commissions aforesaid, rendering to said party of the first part, or his legal representatives, the surplus money, if any there shall be, anything to the contrary notwithstanding."

When we begin search for the meaning of the words in the last paragraph "to remove and dispose of as aforesaid," we find that it means shipping and

selling on the market at National Stock Yards, Illinois. When we take the granting words we have the words "has bargained, sold, *assigned* and transferred" and the words "bargain, sell, *assign* and transfer." It seems, therefore, that on its face the instrument has more of the earmarks of an assignment to raise a fund to pay a debt than of a mortgage.

When we come to examine the law of the place where the cattle were located and the mortgagor resided, it is clear that the parties were as far as possible getting rid of the idea of a chattel mortgage as regulated by that law. The law of sales under chattel mortgages had already been regulated by law. Section 4759 provided as follows:

"At all sales of personal or real property under mortgages and deeds of trust in this state, such property shall not sell for less than two-thirds of the appraised value thereof. Provided, that if the property shall not sell at first offering for two-thirds of the appraisement, then, in case of personal property, another offering may be made sixty days thereafter, and, in case of real property, another offering may be made in twelve months thereafter, at which offering the sale shall be to the highest bidder without reference to the appraisement; and, provided, that real property sold thereunder may be redeemed by the mortgagor at any time within one year from the sale thereof by payment of the amount for which said property is sold, together with ten per cent. interest thereon and cost of sale."

Section 4760 provides as follows:

"When such sales are to be made, the mortgagee, trustee or other persons authorized to make the same

shall, before the day fixed therefor, apply to the nearest justice of the peace of the township in which such sale is to be made, or, if there be no justice in said township, then to the nearest justice of an adjoining township, for the appointment of appraisers; and such justice shall thereupon appoint three disinterested householders of the county, who shall take and subscribe an oath before such justice that they will well and truly view and appraise the property that may be shown them.

Section 4761 provides as follows:

"Such appraisers shall proceed to view and appraise such property, and they, or any two of them, shall make a report of their appraisement in writing, which report shall be attached to the oaths taken as aforesaid, and shall be delivered to the person making the sale, and held by him subject to inspection by all parties interested."

This law was enacted undoubtedly for a purpose, and one of the purposes undoubtedly was publicity in foreclosure proceedings, and the protection of the debtor and the creditors of the debtor.

It will be further observed that it was provided that the delay in chattel foreclosures arising from the want of bidding at the first sale should be fixed, and the statute provided sixty days for chattels, with no redemption, and a sliding scale for realty with a period for redemption. If this instrument is a mortgage it is a fraud upon the mortgage law. On the other hand, does it not partake rather of a contract to consign? See Cobbey on Chattel Mortgages, Section 118 and the index thereto.

In the present instrument the word "*security*" is used with the word "*continuing*" before it in the latter part, but does not aid the matter for the reason that this is not a security for the debt but a security for taking care of the cattle in case the mortgagor does not do so. On its face, this mortgage, if it is a mortgage, violates the law on the subject of sale and satisfaction; it provides for a method different from that prescribed by law. Is the mortgage void on its face? If it is an assignment for the benefit of creditors, yes. It has more of the elements of an assignment than anything else, even though only one creditor was secured, as it appears practically to cover the assets of the debtor, not only present but prospective, and is continuing so as to cover other obligations than the debt of $34,000.

In this connection it becomes relevant to inquire as to how far the term "*increase*" goes. If to the length it must extend in order for C. M. Keys & Co. to get the cattle under its mortgage, the mortgage indeed becomes a continuing security. It seems to the writer that the practical view of the matter would be to put an end somewhere to the word "*increase.*" The Kansas Supreme Court in Holt vs. Lucas, 96 Pacific 31, uses the following:

"There is another principle of law which is not argued in the briefs, but which in our opinion has a

vtial bearing upon this case. The common-law doctrine that a chattel mortgage can only operate on property having an actual and potential existence at the time the mortgage is executed has often been recognized, in previous decisions, as the law in this state. Unless the property can be said to be in existence, there is nothing for the mortgage to operate upon, and it is void. Long v. Hines, 40 Kan. 216, 16 Pac. 339, 10 A. St. Rep. 189, and Id., 220, 19 Pac. 796, 10 Am. St. Rep. 192. So far as third persons are concerned, it can never be treated as a chattel mortgage. Cameron, Hull & Co. v. Marvin, 26 Kan. 612; Townsend v. Allen 62 Kan. 311, 62 Pac. 1008; 52 L. R. A., 323, 84 Am. St. Rep. 388; Bank v. McIntosh, 72 Kan. 603, 84 Pac. 535. Between the parties the mortgage may be valid, and if, after it comes into existence, the mortgagee take possession, he may hold the property against the mortgagor, or against third persons, as a pledge for the security of his debt. Cameron, Hull & Co. v. Marvin, supra. The application of this rule to the case at bar demonstrates that, as to the calves, which from the findings of the jury it appears could not have been in actual or potential existence at the time the mortgage was executed, the judgment is erroneous. The finding is that the calves were from 8 to 11 months old at the time the action was commenced, December 30, 1905. The oldest calves must have been dropped about the first of February, 1905. The date of the mortgage is April 5, 1904. The period of gestation in cows is about 9 1-2 months. This leaves a maring of about 10 days which, it is true, is slight; but the burden rested upon the mortgagee to establish the fact that the increase was in actual or potential existence when the mortgage was executed. Thorpe Bros. & Co. v. Cowles 55 Iowa, 408, 7 N. W. 677. The hogs were found to be 20 months old December 30, 1905. They were conceived, therefore, about December 30, 1903, several months prior to the date of the mortgage, and, being in potential existence, like a crop of grain, the seed of which has sprouted, were properly the subject of a

mortgage lien. The jury found the aggregate value of the hogs and calves to be $180. The value of the calves, apart from that of the hogs, was not found, nor does the aggregate value of both, as found by the jury, correspond with the values alleged in the pleadings and affidavit."

It seems to the writer that either C. M. Keys & Co. did not get the increase or else its mortgage was not a mortgage, and in either event C. M. Keys & Co. have no right to the proceeds of the cattle attached. If it should be conceded that at the start C. M. Keys & Co. secured a mortgage which was due in six months, so as to make the mortgage and the debt correspond, and it should be further conceded that no change had ever been made in the laws as to the district of record, and it should be further conceded that the mortgage of C. M. Keys & Co. was actually and constructively known to the attaching creditor at the time of running the attachment; and it should be further conceded that at the time the First National Bank of Vinia got its mortgage and parted with its money it had constructive knowledge of C. M. Keys & Co.'s mortgage, would it then follow that C. M. Keys & Co. should get the proceeds of the cattle in controversy? It seems not under the logic o fthis decision. But waiving everything else, did not C. M. Keys & Co. show by their own pleading that the debt secured had actually been paid as against other lienholders?

Wat Mayes by his answer put C. M. Keys & Co. on proof. All the other mortgages did the same. Wat Mayes in his cross-complaint plead as follows:

"That pursuant to the terms of said mortgage, defendant in the year 1902, shipped to the said C. M. Keys & Co. a sufficient number of the cattle named in said mortgage to bring and which brought on the open market when sold by them, the sum of about $33,000.00 and in the year 1903, a large number of said cattle which brought about $18,000.00, and in the year 1904, a large number of said cattle which brought about $12,000.00 and in the year 1905, a small number which brought about $200.00, making in all about $63,000.00 in cash received by said C. M. Keys & Co. from the sale of about 2600 head of said cattle, to be supplied in payment of said note and mortgage of $34,800.04. That during the time defendant received from said C. M. Keys & Co., as proceeds derived from the sale of said cattle various amounts not exceeding $11,000.00, leaving a balance in the hands of at least $53,000.00 to liquidate and discharge said debt of $34,800.00 and interest aforesaid and defendant is informed believes and charges should and will be done by the court on a proper accounting between defendant and these interveners."

To this, C. M. Keys & Co. plead as follows:

"And now comes C. M. Keys & Company and Stock Yards Bank, interveners herein, and in answer to the cross complaint filed herein on the twenty-third day of August, 1905, by defendant Mayes, respectfully show to the Court that these interveners have given defendant Wat Mayes due and proper credit for all cattle that have been shipped by him and received by them since the beginning of his account with them, and also for all money paid them by said defendant; that defendant has been charged in his account with all money and other property paid by them to him, a full and complete account of which is hereto attached and

marked Exhibit 'A' and made a part of these interveners' answer to said cross-complaint, which account begins on the first day of March, 1900, and is brought down to and includes September 6th, 1905; that said account has been balanced by the notes given by defendant in favor of intervener C. M. Keys & Company, one for t he sum of $2970.95, on which there is a cred'it of $60.00 and $128.39, and one note for $12,026.74 on which there is no credit; that both of said notes are due and unpaid and represent the balance of the amount due from deefndant Watt Mayes to these interveners, as set out by these interveners in their original plea, and secured by this mortgage.

Wherefore, these interveners pray for judgment as in their original pleading."

So that it was admitted by Keys & Co. that far more cattle were shipped to them than the mortgage debt called for. When we examine the account of C. M. Keys & Co., it unquestionably appears that there were several thousand dollars actually turned back to the mortgagor, there were several thousand dollars applied to othe debts of the mortgagor, and there was an absolute mingling of the entire transaction with Wat Mayes on other indebtedness, and the balance of the general account was sought by C. M. Keys & Co. to be declared a security on the increase of cattle. Can this be done to the detriment of creditors of Wat Mayes? On the facts as plead and admitted by C. M. Keys & Co. in this record, could this be done as between mortgagor and mortgagee? Suppose that Wat Mayes and C. M. Keys & Co. were the only claimants to this fund, and it developed as it was pled and ad-

mitted in this case that more than enough of the mortgaged cattle had been shipped to cover the mortgage debt, would it not be incumbent on C. M. Keys & Co. to show the application of the proceeds of the cattle mortgaged to some other debt with the consent of W. Mayes, in order for C. M. Keys & Co. to hold the proceeds? See Cobbey on Chattel Mortgages, Section 884, as follows:

"In the absence of an agreement or direction to the contrary from the mortgagor, the mortgagee is bound to apply the proceeds of sales of mortgaged property in extinguishment of the mortgage debt. Where third parties had an interest in the mortgaged property, it has been held that the proceeds of the property could not be applied otherwise than to the discharge of the mortgage debt, even by agreement of the mortgagor and mortgagee. Where a mortgagor makes payments to the mortgagee, and there is at the same time a second mortgage on the property, the first mortgagee will not be allowed to apply the payments on other indebtedness than the mortgaged debt, unless it was clearly the intention of the mortgagor that this should be done."

The case of Hughes vs. Johnson, 38 Ark. 285, holds that the burden is on the party alleging the the diversion, which of course would be C. M. Keys & Co. in this case, by consent of mortgagor, and the same case holds that even by consent this could not be done where the rights of third parties intervene. Taking this case in the most favorable aspect to C. M. Keys & Co. in its controversy with First National Bank of Vinita, we have a situation as follows: First National Bank is

a bona fide creditor and a mortgagee, either first or second. Its mortgage was put on record in the Vinita District, where the property was located and the mortgagor lived, on January 16, 1903, the day it was made.

The burden of showing just the state of the account between the mortgagor Mayes and C. M. Keys & Co. was on C. M. Keys & Co., and they filed an account, but it is evident from said account that after the mortgage was made to First National Bank Keys & Co. conducted the affair just to suit themselves, and that of the proceeds of the mortgage cattle, they diverted, either on other indebtedness or supplied to the mortgagor for purposes undisclosed, far more than the fund derived from the sale of the cattle by the receiver, in fact far more than the amount of the debt claimed at the attachment by C. M. Keys & Co. to be secured by mortgage. If one coul dascertain accurately the amount diverted and add to it the amount of the receiver's fund and then deduct the amount of the C. M. Keys & Co. claim at the time of the attachment, there would be far more than enough left to pay First National Bank of Vinita its claim, and it is not supposed that it would be seriously contended that if the amount of the diversion was ten thousand dollars this should not be charged to C. M. Keys & Co. in the adjustment as between them and the First National Bank of Vinita, if it were conceded that First Na-

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tional Bank of Vinita held a mortgage inferior to C. M. Keys & Co., which of course is disputed. If this were done after making allowance for the diversion, the fund in the hands of the receiver would be sufficient to pay the amount due C. M. Keys & Co. secured by mortgage and First National Bank of Vinita also, and the remainder, together with the lot fund would be sufficient to pay First National Bank of Claremore. Was C. M. Keys & Co. entitled to anything as against anybody except the mortgagor, even if it were conceded that the registration was good? It is not believed by the writer that they were, and it is further believed by the writer that the conclusion of the lower court that as against creditors the Keys mortgage had become void and fraudulent after its making, is sustained by the facts in evidence and by the want of facts which under the law it was the duty of Keys & Co. to establish, if they desired to rebut the presumption of fraud raised by the facts i nevidence. In the first place, the increase of the property originally mortgaged was about all that was left and presumptively Keys & Co. had received all the original cattle, which in October, 1901, were 2600 head, of which, in the neighborhood of one thousand head were females. Of these cattle, none were sold by the receiver unless it was some of the cows. Mayes claimed on page 72 that of the original cattle mortgaged to Vinita National Bank, a few were at-

tached, probably 25 head. The record is silent in exact words as to how many, if any, of the original cattle mortgaged to C. M. Keys & Co. were attached, and it is also silent as to whether the cattle mortgaged to Vinita National Bank were mortgaged to Keys & Co. It is contended by the writer that the C. M. Keys & Co. mortgage if of record, was void, by reason of the fact that the record was misleading in that it was not true that such a mortgage existed as the Muskogee record showed, by reason of the fact that as against creditors, the mortgage was dead by virtue of limitation and by reason of the fact that Keys & Co. had actually participated in allowing Mayes to use the mortgage property in such a way as to destroy the mortgage.

An inspection of the recor dshows that Keys & Co. waited from the date of the maturity of the mortgage, which was November 27, 1901, to the date of the intervention in the attachment, August 15, 1905, to make any public declaration of an interest in the cattle. It is claimed that this was such laches as to create an equitable estoppel, and it also was such a delay as to legally cut them off. The doctrine of the Supreme Court of Arkansas as between Mortgagor and Mortgagees as enumerated in 16 Ark. page 148, Sullivan vs. Hadley, is as follows:

"Assuming therefore, by analogy to the rule applicable to mortgages upon land, that where the mort-

gage, or trust deed is upon slaves, and the mortgagor continues in possession, after default of payment, that the mortgagee or trustee, has the same time to bring a bill to foreclose and sell, that is allowed him, under like circumstances, to commence an action at law for the possession of the slaves, we shall proceed upon this hypothesis to determine whether the bill in this case was barred by such limitation.

The trust deed was executed by Lee Sullivan to James Hadley, as trustee, 20th December, 1841, to secure the payment of the debt to John L. Hadley and others, with power to sell the property for the satisfaction of the debts, after the expiration of one year, on default of payment. The maker of the deed remained in possession of the property, and, from the nature of the instrument, it was, doubtless, the intention of the parties, that he should continue until he was in default. After the expiration of the year, Sullivan failing to discharge Hadley'sdebt, the trustee had the right to take possession of the property and sell so much of it as was necessary to pay the debt, &c. If it was necessary, he had the right to bring an action at law for the possession of the slaves, &c. to enable him to sell them, and transfer them to the purchaser; and no demand, it seems, need have been made before suit (Smith et al. v. Robinson, 13 Ark. 538; Evans et al. v. Merriken, 8 Gill & John. 47), and, in such action, the trust deed would have been evidence of his title; or he had a right, as we have seen, to resort to a court of equity to compel the surrender of the property, and obtain a decree for its sale to satisfy the debt.

The right of action accrued on the default, 20th December, 1842, Pickard v. Low, 15 Maine R. 48; Ingraham v. Martin ib. 373. There is no allegation in the bill or evidence, that Sullivan remained in possession of the slaves, after default, under any new agreement or contract with the trustee, or *cestui que trust*, for delay of payment or sale. The bill puts it on the ground of indulgence, on the part of John L. Hadley, prompted by a disposition not to harrass Sullivan. The

trustee seems to have acted, finally, under instructions from the creditor, to take steps to close the trust, given shortly before the filing of the bill.

Such is the inference from the allegations of the bill. Mere indulgence, on the part of the trustee or creditor, would not prevent the running of the statute. in the absence of any act, on the part of Sullivan, to prevent it.

On the default, the trustee might have brought replevin or detinue for the slaves. Three years was the limitation to the former action. Revised Statutes, chap. 91, sec. 6; Digest, chap. 99, sec. 7; Payne v. Bruton, 10 Ark. 54. Upon principle, the same period was the limitation to detinue.

In the absence of an act, therefore, on the part of Sullivan, recognizing the right of the trustee to the slaves after the default, three years would have barred their recovery, by the act of limitation then in force."

In Whittington vs. Flint, 43 Ark. 504, this case was modified as shown by note to case as follows:

"So far as this case holds that adverse possession may be set up by a mortgagor without a distinct denial or acts inconsistent with the mortgagee's title it is overruled. Whittington v. Flint, 43-504."

The last case was one pertaining to real estate, property that is lasting and not perishable, but the case does not undertake to overrule the reasoning of Sullivan vs. Hadley as applied between a mortgagee of personal property and another creditor of the mortgagor. It is believed, however, that as between an overdue mortgage on personal property, which the mortgagee takes no steps to foreclose or to give notice of by registry, and creditors that a court of equity in the Indian Territory would adopt a much shorter time

than the legal statute bar on the principal of laches, amounting to estoppel.

Mr. Cobbey in his work on chattel mortgages at paragraph 866 summarizes the doctrine as follows:

"THE RIGHT TO TAKE POSSESSION SHOULD BE EXERCISED WITHIN A REASONABLE TIME."

And 867 as follows:

"CONTINUOUS AND OPEN POSSESSION SHOULD BE MAINTAINED BY THE MORTGAGEE."

And 1047 as follows:

"A FIRST MORTGAGEE MAY LOSE HIS PRIORITY BY NEGLIGENCE."

Recognizing thi sduty as being a duty that on principles of equity is owing, some courts have gone much farther than the court below went in this, even if delay was the only feature here. Mr. Jones at paragraph 369 of his work on chattel mortgages states the doctrine as follows:

"The failure of a mortgagee to take possession at the time of forfeiture, as stipulated in the mortgage, does not generally invalidate the mortgage. Under the registry laws, the record or filing of a mortgage is made a substitute for the delivery of possession. Whether the mortgaged goods after default continue to be holden under the mortgage, or become absolutely the property of the mortgagee, the mortgagor's possession can at most be but evidence of fraud.

The retention of possession by the mortgagor after the law day is neither conclusive evidence of fraud nor *prima facie* evidence of it: not a circumstance to which the law attaches the presumption of payment.

If the mortgage secure several notes falling due at different times, the mortgagee may permit the property to remain in the mortgagor's possession until happenning of the last default."

In Section 370 is a discussion showing the reason, as follows:

"But in Illinois, Colorado, and Montana, the mortgage must take possession within a reasonable time after default, when possession remains with the mortgagor until default, under a provision to that effect in the deed. If possession be not so taken, the mortgage is regarded as fraudulent *per se*. The policy of the law, in adopting this rule, is to protect purchasers, and to prevent the perpetration of frauds. As the property vests in the mortgagee on the maturity of the mortgage, and he allows the mortgagor to remain in possession, a purchaser from the latter, or his creditor, is protected, because the law regards his holding possession as evidence that the mortgage is paid and if it is not paid, it is a fraud on a *bona fide* purchaser or creditor that he should be allowed to hold this badge of ownership. The question of diligence is one both of law and of fact. It is for the court to determine what time under the law is reasonable, and for the jury to determine whether the mortgagee reduced the mortgaged chattels to possession within that time.

If a mortgage be given to secure a debt of several hundred dollars, evidenced by two notes, one for one dollar, payable in one year, and the other for the balance of the debt, payable in about a month, the inference is that the making of the note for one dollar was a mere device to prevent the cerditors of the mortgagor from seizing the good for a long period after the debt had matured, and that the mortgage was fraudulent."

In the next section he gives instance after instance of delays that were held unreasonable. It will thus be seen that under all the decisions, the registry laws can-

not be used as a means to enable the debtor to remain in possession an unreasonable length of time after maturity of the mortgage under the penalty of postponement. The principle of estoppel as applie dto the Keys & Co. mortgage is by no means new; it is as old as Twyne's case, and it is being announced every day by the courts of Oklahoma. In First National Bank of Holdenville vs. Kissare, 98 Pacific 432, this Court reversed the finding of a jury in the United States Court and dismissed the case at the cost of the defendant in error, and all the justices concurred. The jury found the cattle belonged to defendant in error. Plaintiff in error claimed that defendant in error was estopped to deny ownership in the mortgagor in plaintiff in error's mortgage. The Court, after quoting authorities, says:

"That Kissare by branding his cattle in Butler's brand and sending the mfrom Conway, Ark., to Holdenville, Ind. T., many miles from where they were known as his property, and by placing them in Butler's possession, thereby clothed Butler with the highest indicia of title thereto, there can be no doubt. It is a well known fact that cattle bearing a brand are by the business world taken to be the property of the owner of the brand. B ythus branding them, Kissare not only proclaimed to the world Butler's ownership in the cattle as effectually as he could have done by any other means, but just as effectually disclaimed ownership in them himself. It is undisputed that the bank knew these cattle to be in Butler's brand, and in good faith relied upon this apparent ownership and loaned Butler $3,000 secured by the chattel mortgage in evidence on the cattle, believing him to be the owner. We are of the opinion that it would be a fraud upo nthe bank to

permit Kissare under the circumstances to assert title to the property, and that he is estopped from so doing."

If the facts in that case called for a reversal and dismissal on the ground of estoppel, whether arising from negligence or design, what reason is there for holding that Keys & Co. was not by negligence estopped in this case. But negligence is not all in this case, there was fraud, actual, as claimed by Mayes in his cross-complaint and admitted in effect by Keys & Co. There were several thousand dollars of the proceeds of the cattle that went through Keys & Co.'s hands actually applied to other debts besides the mortgage as actually plead and admitted by Keys & Co., while the mortgage appeared at Muskogee unsatisfied and undiminished. The face of the mortgage has heretofore been commented on. Independent of the mortgage, independent of the delay, indpendent of the estoppel arising therefrom, independent of the failure to record at Vinita, independent of the failure to record or index at Pryor Creek, with legal consequences flowed from dealing with the property?

Ordinarily, an apology would be due the Court for citiing authority to the effect that the course of dealing between mortgagor and mortgagee is as efficacious to establish fraud and the consequent invalidity of the mortgage as positive stipulations in the mortgage, but in this case some question was made on the argument

on this point. The Supreme Court of Arkansas, in Gauss Sons vs. Doyle & Co., 46 Ark. 125, prior to the adoption of the Arkansas procedure, so held, and such was the rule of law during all the times involved in this controversy. The Supreme Court of Idaho, in 94 Pacific, page 430, case of Ryan vs. Rogers, says in reference to this state of case:

"Where a person takes a mortgage upon a stock of goods, which contains provisions that the mortgagor may remain in possession and continue to sell the goods, and shall apply the proceeds of the sales on the mortgage debt, and it appears that the mortgagor did continue in possession thereof for about nine months, and sold off the greater portion of the stock so mortgaged, and made no application of the proceeds of the sale in payment of the mortgage debt, with the knowledge and permission of the mortgagee, such transactions are prima facie evidence of the invalidity of the mortgage. From the evidence, it i sclear that the mortgagee knowingly permitted the mortgagor to continue to sell the merchandise covered by the mortgage for more than nine months after its execution, and appropriate the proceeds to his own use. It was held in Rocheleau v. Boyle, 11 Mont. 451, 28 Pac. 872, a case similar to the one at bar, that the phrase 'knowingly permitted' was equivalent to 'understood and agreed,' and the court there held that a mortgage under such facts and circumstances 'becomes a mere sham, a mere appearance; a delusion asserting in form what is not a fact.'

Conceding that the mortgage was valid when executed, the acts and conduct of the parties, after its execution, were such as to annul its provisions so far as creditors and trustee in bankruptcy of the mortgagor were concerned."

The same court in the original opinion says:

"The fact that the mortgagee permitted the mortgagor to remain in possession of the property, which was within itself something like double the value of the debt secured, for a period of one year, and for at least nine months after breach of the conditions named in the mortgage, and sell and dispose of the property, without any attempt to collect any part of the mortgage debt, or take possession of the property, would, as a matter of law be such a fraud upon attaching creditors and purchasers as t oavoid the mortgage."

The cases in the 28th Pacific, 7th Pacific and 72d Pacific sustain the position. The case of Lewiston National Bank vs. Martin, 23 Pacific 920, bears upon the point and contains a good discussion of the policy of the recording acts and also of the application of the decisions of the Federal Courts. The case of Wilson vs. Vaught from Colorado, 13 Pacific 726, likewise discusses the bearing of the Federal cases on the subject, and it follows them in announcing that the mortgage becomes void by reason of the dealings of the parties. The trial court followed precedent, therefore. In the case at bar it is believed that the Court in its opinion has necessarily viewed the matter as a Federal question, as it has announced that owing to the failure of a Federal official to perform a duty imposed on him by Act of Congress, for the reason that Congress failed to make an appropriation, C. M. Keys & Co. are not to lose their mortgage lien. It is well therefore to look to the Federal decisions on the subject. It is be-

lieved by the writer that practically all the questions involved herein are of a Federal nature, as the rights of the parties depend upon statutes in force in the Indian Territory, all of which were laws of the United States. See Rose's Federal Procedure, Par. 38. It seems, therefore, that the decisions of Federal Courts would be controlling. The case of Swofford Brothers Dry Goods Co. vs. Smith-McCord Dry Goods Co. 37 C. W. 103, was decided by the Indian Territory Court of Appeals.

It was there held that in a case like this the burden was on the party occupying the position of C. M. Keys & Co. to establish their claim, and it also holds that the use by the mortgagor with knowledge of the mortgagee of the funds derived from the mortgage security avoids the mortgage, even though the mortgagee by inadvertance included the property used. This case was affirmed by the Circuit Court of Appeals for the Eighth Circuit, and the Court holds that the question of the mortgagee's participation in the fund was a question for the jury, and the doctrine as to including property by mistake which the mortgagee permitted the mortgagor to use is affirmed in 85 Federal 417. The attachment branch of the case was subsequently considered in 54 S. W., page 814, and the Court says:

"There is no question but that the first transaction—the sale of the firm property of Brock — was fraudulent. A scheme by which an endorser of a note

of a failing firm for $850, given for goods recently purchased, is to be made whole by a purchase of all the available assets of the firm, worth some four or five thousand dollars, by a payment of the note, with the balance deferred nine and twelve months, is fraudulent as to creditors. It is such a disposition of the property of the firm as is, in law and in fact, intended to cheat, hinder and delay creditors; and this is conceded by appellees. * * *

A fraudulent disposition of the property had been made, and from that moment every creditor of the firm was given the right by law to attach, and no dispositio nof the property thereafter made could alter or abridge that right. If, after this fraudulent transfer had been made, other creditors than the attaching ones, in their race of diligence to secure the payment of their debts, fairly and honestly got possession of the property, or fixed liens upon it, they would have the right to establish their claims; not in the attachment suit, for they are not parties to that, but either by a separate action or as interpleaders."

In the case of Re H. G. Andrae Co., 117 Federal 561, the Court holds that unreasonable delay in filing would render the mortgage void as against creditors. In the present case the debt of First National Bank of Vinita occurred at Vinita in the Vinita District, and also of First National Bank of Claremore at Claremore in the Vinita District, after the division into the Western and Northern Districts. C. M. Keys & Co. failed to give notice in the District. See in this connection Ryan Drug Store Co. vs. Hvambsahl, 61 N. W. 299, holding that a delay from June 29, 1892, to August 22, 1893, to file would render the mortgage fraudulent and void. The same case holds along with Arkansas

that actual knowledge o fthe existence of such a mortgage does not affect the matter. In Re Standard Telephone & Electric Co., 157 Federal 108, the same doctrine as found in 117 Federal 561, is announced. In Pyatt vs. Powell, decided by the Circuit Court of Appeals for the Eighth Circuit, 51 Fed. 551, it is held that at common law a mortgage unaccompanied by possession is prima facie fraudulent and void, but by virtue of the statute in force i nthe Indian Territory this was changed so that this prima facie presumption becomes conclusive. See Section 4743 of Mansfield's Digest on registration and Sections 3377 and 3378 of the statute of frauds. In the Indian Territory, by virtue of Section 4754, the right of possession after default was in the mortgagee and with it the duty to take possession necessarily followed. The case of Crooks vs. Stuart, 7 Federal 802, holds the doctrine that leaving the mortgagor in possession without record invalidates the mortgage. The case of Re Reynolds, 153 Federal 297, decided by Judge Rogers, holds in effect that when C. M. Keys & Co. undertook to take a mortgage upon the original stock of cattle, all increase and additions thereto, and the mortgage itself made merchandise of the cattle, and allowed the mortgagor to ship when he would, provided he paid the commission, it became void *ab initio*, and if not void *ab initio*, it could only be made good by getting possession before the claims of

others attached. The case reviews the Arkansas decisions and the Federal decisions. Of course, the same principle applies to a stock of cattle that would apply to a stock of hardware, a stock of dry goods, or a stock of anything else, the moment they are made by the instrument or conduct of the parties merchandise.

The Circuit Court of Appeals for the Eighth Circuit, in Dodge vs. Norton 133 Federal 364, considered the same question in a case from Colorado. The court held that according to the Colorado decisions, the mortgage being void by reason of making merchandise out of part of the mortgage security it became void as to what was not merchandise, and it further says:

"Under these rules of law, the only question open for consideration in reference to the validity of this mortgage is whether or not the mortgagee consented to the sale by the mortgagor of the electrical fixures and supplies, the rolled steel, and the other small amounts of merchandise which it sold in the ordinary course of business, without applying the proceeds to the payment of the mortgage debt. The referee and the district court found that such consent was given, that it was within the contemplation of both of the parties to the mortgage when it was made that the electrical supplies should be sold to the customers in the usual course of trade, that the raw materials should be consumed in the manufacture of machines or sold to purchasing customers as opportunities presented themselves, and that there was no other way in which the mortgagor could use and enjoy these goods. If this question were presented here for the first time there might be room for the contention that the evidence does not conclusively show that the mortgagee contemplated or consented to this course of action. But

in view of the fact that the electrical supplies and fixtures were not necessary to, or useful in, the business of manufacturing, but were kept and sold as merchandise; that raw materials were so sold whenever a customer sought to buy them; that the mortgagee lived in the city where this property was situated, and occasionally visited the store from which these sales were made; and that he took no teps for many months nor until litigation was commenced to seize the property on account of the sales—this record does not so clearly show that the referee and the court were mistaken in their findings that an apellate court should reverse it."

It appears, therefore, according to the decisions of the Federal Courts and the Arkansas Court, the C. M. Keys & Co. mortgage by virtue of the stipulations therein and by virtue of the handling of the property by the mortgagee and mortgagor is fraudulent as against creditors, and that the burden is on C. M. Keys & Co. to establish its validity. But this is not all. The Supreme Court of the United Sates, which Court is the final arbiter of rights under Federal law, held such a mortgage fraudulent and void. Wait on Fraudulent Conveyances and Creditors' Bills at paragraphs 348-351 discusses the matter in the light of the decisions of the Supreme Court of the United States as follows:

"Par. 348. RULE IN ROBINSON V. ELLIOTT. —The Supreme Court of the United States, in Robinson v. Elliott ,committed itself unreservedly to the doctrine that an instrument which provided for the retention of the possession of the mortgaged personalty by the mortgagor, accompanied with the power to dispose

of it for his own benefit in the usual course of trade, was inconsistent with the idea of a security, or the nature and character of a mortgage, and of itself furnished a pretty effectual shield to a dishonest debtor, and consequently should be regarded as voidable as to creditors. Davis J., said: 'In truth, the mortgage, if it can be so called, is but an expression of confidence, for there can be no real security where there is no certain lien. Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what the did do was to allow the mortgagors, under cover of the mortgage, to sell t hegoods as their own and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time.' It must be remembered that, in Twyne's Case, where the transfer was avoided, one of the objections urged against the transaction was that the debtor used the goods as his own. Mr. Pierce observes: 'A mortgage or conveyance of this kind presents a false appearance, is only a pretense as a mortgage, is calculated to deceive, cannot fail to deceive, if it be operative, furnishes unusual facilities for fraud, reserves benefits to the grantor, and prejudices other creditors. When it thus appears that the transaction is, in its results, so fraudulent, and so injurious to creditors, that few transactions could be more so, even where an intent to defraud exists so as to bring them within the statute of 13 Eliz., the courts are as ready to adjudge the transaction fraudulent as they would be if a fraudulent intent appeared.'

PAR. 349.—In Edgell v. Hart the license to sell was inferred from a written schedule attached to the instrument. Chief Justice Denio held, with the concurrence of a majority of the court, that 'the existence of such a provision out of the mortgage or in it, would invalidate it as matter of law, and that where the facts are undisputed this court should so declare.' 'Such an agreement,' said J., 'opens the door of fraud; and permits the mortgagor to use the property for his own benefit, utilizing the mortgage as a shield against oth-

er creditors.' The debtor, in the language of Kent, 'sports with the property as his own.' In Mittnacht v. Kelley, Parker J., observed: 'The mortgaging the whole stock in trade, * * * * *with the increase and decrease thereof*, and the providing for the continued possession of the mortgagor, can have no other meaning than that the mortgagee should all the time retain a lien o nthe whole stock by way of mortgage, the mortgagor making purchases from time to time, and selling off in the rdinary manner, the intent being not t ocreate an absolute lien upon any property, but a fluctuating one, which should open to release that which should be sold and take in what should be newly purchased. This is just such an arrangement as was held in Edgell v. Hart to render the mortgage void. The case cannot be distinguished from that, and the law as pronounced i nthat case, must be held applicable to this.' In Griswold v. Sheldon, Bronson, C. J., says: 'There would be no hope of maintaining honesty and fair dealing if the courts should allow a mortgagee or vendee to succeed in a claim to personal property against creditors and purchasers, after he had not only left the property in the possession of the debtor but had allowed him to deal with and dispose of it as his own.' 'To attempt,' says Mr. Pierce, 'to fasten a valid and certain lien upon goods which may at any moment, at the will of the debtor, fly out from under the lien, is to attempt a legal and moral impossibility.' It is a sham, a nullity—a mere shadow of a mortgage, only calculated to ward off other creditors—a convey ance in trust for the benefit of the person making it, and therefore void against creditors.

Par. 350. PROOF EXTRINSIC TO THE INSTRUMENT.—The rule as we have seen is the same, whether the agreement is recited in the instrument or is extrinsic to it. Thus Allen, J., remarked: 'Whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference in principle. Its effect as characterizing the transaction would be the same. The difference in the modes of

proving the agreement cannot take the sting out of the fact and render it harmless. If it is satisfactorily established, the result upon the security must be the same.' When not embodied in the instrument the agreement to sell must be proved. The mere expectation of one party or the other that this right is to be given is not enough; there must be a conscious assent of both. In Potts v. Hart, Earl J., said: 'A mortgage thus given is fraudulent and void as to creditors because it must be presumed that at least one of the purposes, if not the main purpose for giving it, was to cover up the mortgagor's property and thus hinder and delay his other creditors. It matters not whether the agreement that the mortgagor may continue to deal in the property for his own benefit is contained in the mortgage or exists in parol outside of it, and where the agreement exists in parol, it matters not whether it is valid so that it can be enforced between the parties or not; for whether valid or invalid it is equally effectual to show the fraudulent purpose for which the mortgage was given, and the fraudulent intent which characterizes it. It is always open to creditors to assail, by parol evidence, a mortgage or a bill of sale of property as fraudulent and void as to them. While between the parties the written contract may be valid, and the outside parol agreement may not be shown or enforced yet it may be shown by creditors for the purpose of proving the fraudulent intent which accompanied and characterized the giving of the written instrument. It is usually difficult to prove by parol an agreement in terms that the mortgagor may continue to deal in the property for his own benefit. Parties concocting a fraudulent mortgage would not be apt to put the transaction in that unequivocal form. But all the facts and circumstances surrounding the giving of the mortgage, and the subsequent dealing in the property with the knowledge and assent of the mortgagee, may be shown and they may be sufficient to justify the court or jury in inferring the agreement; and so the parol agreement was inferred in all the cases which have come under our observation.'

Par. 351. COMMENTS IN THE CASES.—Chief Justice Parker, in speaking of these shifting liens, observes that 'if this doctrine were admitted, a mortgage of personal property would be like a kaleidoscope, in that the forms represented would change at every turn, but, unlike the instrument, in that the materials would not remain the same.' The objection may be re-stated, to the effect that the mortgagor may dispose of the property, defeat the mortgage, and put the money in his own pocket; but if he refuses to pay a debt, and creditors seize the property in execution against his will, the mortgage steps in and restores it to the debtor. Again, it is said that there is no specific lien, but 'a floating mortgage, which attaches, swells, and contracts, as the stock in trade changes, increases, and diminishes, or may wholly expire by entire sale and disposition, at the will of the mortgagor. Such stipulations are not only inconsistent wit hthe idea of a mortgage, but tend inevitably to give a fraudulent advantage to the debtor over his other creditors."

A large part of the foregoing argument consists of extracts from the brief before the Supreme Court of Oklahoma. Since t he decision in this case, that Court has had occasion to pass upon the question as to the Arkansas Law concerning the Registration of Chattel Mortgages; in the case of Hobbs v. Young, decided by that Court, and reported in the 120 Pac. at page 947, the court says:

"Under the Arkansas decisions which had been rendered prior to the time that this Statute was enacted over the Indian Territory by Act of Congress, it seems that the plaintiff's mortgage was void as against a stranger, at least unless the stranger stole the property or was a tresspasser in taking possession of the property."

In that case, the case of Martin v. O'Brannon, 35

Ark. p. 62, was cited with approval. The Arkansas case was one on the subject of the words that must be used in taking an acknowledgment. It held that the word "uses" could not be substituted for the word "consideration." In the case of Little v. Dodge, 32 Ark. p. 453, the Arkansas Court had occasion to refer to the qualifying words in a statutory acknowledgment, and the logic of the decision is that they are just as essential as the words qualified. In the present case the words "and set forth" are omitted altogether and nothing is used to supply their omission. See page 39. Under the decisions unless everything that is mentioned is also cisions unless everything that is mentioned is also "set forth" and vice versa,. the acknowledgment must be fatally defective. It is fair to presume that if the Arkansas Legislature in prescribing the essential qualifications saw fit to use the word "mentioned" and to use the words "set forth" as a part of the acknowledgment, that no construction that leaves off the words "set forth" and that holds the word "mentioned" is the same as the words "mentioned and set forth" must necessarily affirm that the Legislature used some useless jagan in prescribing the forms for Statutory Acknowledgments. Is there not as much difference between the word "mentioned" and the words "set forth" as there is between the word "uses" and the word "consideration?"

With this interpretation of this Statute already pronounced, and Congress adopting the law, it adopted the construction with it. The Supreme Court of Oklahoma in Fritz v. Brown, 95 Pac. p. 437, applied a strict rule, and under the logic of that decision carried to its rational length the acknowledgment in this case was bad. That same Court in the case of First National Bank of Holdenville v. Kessere, 98 Pac. p. 433, held that the owner of cattle who allowed the agistor to put the cattle that he was hired to pasture under his brand was estopped from denying that the agistor was the owner of the cattle after he had given a chattel mortgage upon them, even though the brand of the owner was still on the cattle. The court went on the theory that because the owner had allowed the cattle to be and remain in the possession of the other man with his brand thereon, and nothing put upon record to indicate the rights of the real owner, he thereby became equitably estopped from denying the right of the mortgagee to whom the cattle had been transferred by the person who had the cattle to pasture. In the present case this court held that in the face of a positive statute requiring the registration at Vinita, and in the face of a positive statute requiring the instrument to be indexed at Pryor Creek, the mortgagee could allow the mortgagor to retain the mortgage property carrying with it all the indicia of ownership without putting anything

on record in either place, and the decision goes to the length of holding that a mortgage of that character unrecorded and unindexed in the District where the mortgagors resided, and where the cattle were, would hold not only the original cattle but the increase of the cattle that was not in existence at the time of the giving of the mortgage. In the present case, it went further; and a large part of the cattle in question, if embraced in the mortgage at all, were off-spring of off-spring. Under the authorities heretofore cited if the mortgagee was to avoid the necessity of taking possession of these cattle, he had a duty to perform; the Statute of Limitations itself would have run in this particular case as against the claim of the mortgagee in favor of the mortgagor, if the possession were adverse. If this be true as against strangers and creditors would not the position be much stronger?

The remaining assignments of error in case No. 263 are especially called to the attention of the court. The points of law involved in them have already been discussed in the previous assignment. The latter assignments are intended to raise the question of the rulings of the Supreme Court on the first appeal; the latter assignments are practically the same as the first assignments, except that the one refers to the rulings on the first appeal, and the other refers to the rulings on the second appeal. The 44th assignment is based

upon the action of the Supreme Court in refusing to make orders sufficiently explicit to do justice between the parties and to cause the funds to be properly distributed. This has already been discussed. The First National Bank of Vinita in addition to the argument presented in case No. 263, and the citation of authorities, calls the attention of the court to each of the assignments of error that it has made in the fore part of the brief. And it urges the same matters and things that are alleged and urged by the First National Bank of Claremore. It further says that this record is silent as to whether or not it had any actual knowledge of the existence of the Stock Yards Bank Mortgage when it got its mortgage. It insists further that this matter is immaterial under the Arkansas decisions if the Stock Yards Bank mortgage was not properly of record. It further insists that if the mortgage was properly of record, then that on general principles of law by reason of the method pursued in handling the cattle the Stock Yards Bank is postponed under its claim to it. The Citizens Bank of Pryor Creek, the plaintiff in error in Number 302, urges the same matters and things and cites the same authorities as are cited on behalf of the plaintiff in error in No. 263; and plaintiff in error, John C. Hogan, in Case No. 303, urges the same matters and cites the same authorities as are cited by the plaintiff in error in No. 263, and insists up-

on each assignment of error contained in the foregoing brief.

It may perhaps be contended in this case that Congress was without the power to change the recording districts and to require the re-recording of instruments in the new districts. In the event this contention is made the attention of the court is respectfully called to the several citations of authorities which appear to be decisive on that question:

Among other authorities is the case of Moline Plow Company v. Whitman, decided by the Supreme Court of Kansas, and reported in 34 Pac. p. 751; and also Citizens Bank v. Julian, 153, Ind. p. 655; and 55 N. E. p. 1007; and Call v. Hastings, 3d. Calif. p. 179; also Stafford v. Lick, 7th Calif. p. 479; also Brison v. Hardan, 18 Mo. p. 13.

In the case at bar, Congress had the right in the exercise of police power to require the additional expense to be made, and it had the right to say to any mortgagee, who desired to allow the mortgagor to remain in possession, that if this was done notice of the mortgage should be given in the new subdivision. These were the terms prescribed by the sovereign power. C. M. Keys & Company in this regard, are in the attitude of standing upon the proposition that Congress could not require them to put up a few cents to give notice to other parties, and relied upon the

proposition that because Congress said that mortgages theretofore recorded should not be required to be recorded again in the new district but that indexing should be sufficient, and because Congress said "without further cost" they escaped cost altogether. Thereby making the Statute mean the same thing after it used the expression "without further cost" as it would have meaned had it said "without cost." In this connection, the attention of the court is called to the case of J. B. Ruggles, v. W. J. Cannedy, et al., appellants, decided by the Supreme Ct. of Calif., and reported in 46 L. R. A. 171, and also Mr. Cobbey's work on Chattel Mortgages, Paragraph 866 and paragraph 1047. Sullivan v. Henley, 16 Ark. p. 189; also the case of McFadden v. Evans-Snyder-Buel Co. decided by the Supreme Court of the U. S., reported in Book 46 Lawyer's Co-Operative Pub. Co. edition p. 1013, and the same case is reported in the 105th Fed. p. 293.

The respective plaintiffs in error say that a resume of their position in this case, is as follows:

I.

That when the recorder's office for the Northern District of Indian Territory was changed from Muskogee to Vinita, it was the duty of all persons who held mortgages against residents of the Northern District as changed, if they desired to allow the mort-

gagors to retain possession, to record their mortgages in some way at Vinita.

2.

That under the law the duty of the Clerk was to open the office and prepare the books for the reception of mortgages and upon this being done the mortgagees holding mortgages upon residents of the Northern District should cause to be recorded, or in the case of past due mortgages foreclose the mortgage, to take possession in some way of the property, if they desired to preserve the property from the chance of liens being acquired by attachment or purchase.

3.

That upon the passage of the Act of Feb., 1903, it became the duty of all mortgagees, who desired to prevent the acquisition of liens upon the property mortgaged to cause their mortgage to be recorded or indexed in the District where the property was, and the mortgagor resided.

4.

That it was not the duty of the Clerk to index any mortgage until requested so to do.

5.

That by reason of the delay of the Stock Yds. Bank in taking possession of the mortgaged property after default, the other liens attached to the property

and became superior to that of C. M. Keys & Company.

6.

That the mortgage of C. M. Keys & Co. did not cover the younger cattle.

7.

That the acknowledgment of the mortgage of C. M. Keys & Company is fatally defective.

And the respective plaintiffs in error request the Court to reverse the action of the Supreme Court of the State of Oklahoma, and to direct the District Court of Craig County, Oklahoma, to carry out the judgment of the United States Court in the Indian Territory of the Northern District; and to do all other things that are necessary to do justice between the parties, and the respective plaintiffs in error ask for their costs.

FIRST NATIONAL BANK OF CLAREMORE,
Plaintiff in Error in Case No. 263.
By W. H. KORNEGAY, Its Attorney.

FIRST NATIONAL BANK OF VINITA,
Plaintiff in Error in Case No. 264.
By W. H. KORNEGAY, Its Attorney.

J. C. HOGAN,
Plaintiff in Error in Case No. 303.
By J. HOWARD LANGLEY, Its Attorney.

CITIZENS BANK OF PRYOR CREEK,
Plaintiff in Error in Case. No. 302.
By J. HOWARD LANGLEY, Its Attorney.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1912.

First National Bank of Claremore, *Plaintiff in Error,*

vs. **No. 263.**

C. M. Keys and Hugh Mills, a Partnership, Under the Name of C. M. Keys & Co., Stock Yards Bank and Wat Mayes, - - *Defendants in Error.*

First National Bank of Vinita, *Plaintiff in Error,*

vs. **No. 264.**

C. M. Keys and Hugh Mills, a Partnership, Under the Name of C. M. Keys & Co., Stock Yards Bank and Wat Mayes, - - *Defendants in Error.*

Citizens Bank of Pryor Creek, *Plaintiff in Error,*

vs. **No. 302.**

C. M. Keys and Hugh Mills, a Partnership, Under the Name of C. M. Keys & Co., Stock Yards Bank and Wat Mayes, - - *Defendants in Error.*

J. C. Hogan, - - - - - *Plaintiff in Error,*

vs. **No. 303.**

C. M. Keys and Hugh Mills, a Partnership, Under the Name of C. M. Keys & Co., Stock Yards Bank and Wat Mayes, - - *Defendants in Error.*

MOTION *to* DISMISS WRIT *of* ERROR.

And now come defendants in error, C. M. Keys & Company and Stock Yards Bank, and respectfully show to the court that this court is without jurisdiction of this case for the following reasons, to-wit:

I.

That the final decision of the Supreme Court of Oklahoma, the highest court of said state, rendered January 10, 1911, rested upon an independent ground not involving a federal question, and broad enough to maintain the judgment.

II.

That the decision of the Supreme Court of Oklahoma on the first appeal, rendered September 14, 1909, determined all the questions presented and involved in this controversy and all the rights of the parties thereby became and were *res adjudicata,* and all the parties to the action and that court itself were and are bound by that judgment; and the Supreme Court of Oklahoma had no right to review that judgment on the second appeal.

III.

That there is no federal question presented by plaintiff in error in its complaint and none claimed by it in its original pleadings.

IV.

That the decision of the Supreme Court of Oklahoma was not against a right claimed by plaintiff in error under the federal laws, or the validity of a treaty, or an authority exercised under the United States.

V.

That there was not drawn in question by plaintiff in error the validity of a statute, or an authority exercised under any state, on the ground of repugnancy of the Constitution, treaty, or laws of the United States, and the decision of the Supreme Court of Oklahoma was not in favor of their validity.

VI.

That there was no right, title, privilege or immunity claimed by plaintiff in error under the Constitution, laws, or treaties of the United States, or commission held, or authority exercised under the United States, and the decision of the Supreme Court of Oklahoma was not against any such right, title, privilege or immunity set up or claimed by plaintiff in error under the Constitution, laws, treaties, commission or authority.

VII.

That this court will not review on writ of error the judgment of the District Court of Craig County, Oklahoma.

VIII.

That this court will not review on writ of error the decision of the Supreme Court of Oklahoma on the first appeal to that court, because those questions are *res adjudicata.*

IX.

That the final decision of the Supreme Court of Oklahoma was correct, regardless of any federal question.

Wherefore, defendants in error pray the court that this motion to dismiss may be submitted and considered in connection with the entire case on its merits and that the writ of error may be dismissed.

ROBERT F. BLAIR,

Wagoner, Okla.,

Attorney for Defendants in Error, C. M. Keys & Company and Stock Yards Bank.

In the

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BRIEF FOR STOCK YARDS BANK AND C. M. KEYS & COMPANY, DEFENDANTS IN ERROR.

Counsel for plaintiff in error have failed to comply with rule XXI of this court, which requires them to file a brief containing a concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised; but, instead, they have copied into their brief the pleadings, exhibits, evidence and even the marshal's return on the order of attachment. A large part of this is immaterial now, and it is not necessary that the court should be compelled to read it. I think I can aid the court better to understand the questions presented for determination here by making the following:

STATEMENT *of the* CASE

On July 20, 1905, plaintiff in error, First National Bank of Claremore, hereinafter designated as plaintiff, commenced this action against Wat Mayes, hereinafter designated as defendant, in the United States Court for the Northern Judicial District of Indian Territory, at Vinita, by then and there filing its complaint at law, wherein it was alleged that defendant was indebted to plaintiff on a promissory note, dated January 8, 1903, for $4206.02, due one year after date; also an another promissory note, dated July 13, 1904, due January 8, 1905, for unpaid interest on the larger note; and also on an account for $111.82 (Rec., p. 28).

On the same date, to-wit, July 20, 1905, plaintiff sued out an order of attachment and caused the same to be levied upon 648 head of cattle, then in the possession of the defendant, about three miles southeast of Pryor Creek, Indian Territory (Rec., pp. 29-30).

On August 15, 1905, Stock Yards Bank and C. M. Keys & Company, hereinafter designated as interveners, by permission of the court, filed their interplea in said case, wherein they alleged that on October 29, 1901, defendant being indebted to intervener, C. M. Keys & Company, made, executed and delivered to said intervener his one certain

promissory note for $34,800.04, due and payable to the order of said intervener, six months after date at National Stock Yards, Illinois, to secure which said defendant at the same time made, executed and delivered to said intervener a chattel mortgage on 2835 head of mixed cattle and their increase and additions, then situated about three miles southeast of Pryor Creek, Indian Territory; that at two o'clock in the afternoon on October 31, 1901, said intervener duly filed said mortgage and had the same properly recorded in the office of the Clerk of the United States Court for the Northern District of Indian Territory at Muskogee, which clerk was then and there ex-officio recorder for said district, by reason of which said intervener then and there claimed, acquired and fixed a lien on said property, which lien has since been and is now a valid and subsisting lien on all of said property.

That before said note became due and for a valuable consideration said intervener negotiated and sold same to intervener Stock Yards Bank and it became the owner and holder of said note and mortgage and the superior title and right of possession in and to said cattle. That when said note became due defendant paid a part of said indebtedness and gave his notes for the remainder thereof, and from time to time thereafter the defendant made various payments on said indebtedness until on the first day of March, 1905, and as evidence of the remaining indebtedness due from defendant to said

interveners, defendant made, executed and delivered to intervener, C. M. Keys & Company, his one certain promissory note for the sum of $1226.74, due and payable to the order of said intervener six months after date at National Stock Yards, Illinois, with interest at the rate of seven per cent per annum from date; also one like note, dated January 16, 1905, for the sum of $2970.95, and also one like note dated February ..., 1905, for the sum of $500.00. That these notes were in like manner negotiated and sold by said intervener to intervener Stock Yards Bank and it became the owner and holder thereof for value and the owner and holder of said mortgage; that there was then due and unpaid on said notes the sum of $15,288.69, for which amount said interveners prayed judgment. They further prayed the court to transfer the case to the equity docket and refer the same to the master to take evidence and make report, and that upon a final hearing the court adjudge said mortgage lien of interveners to be the first and paramount lien upon said property and that the same be foreclosed and the property sold and the proceeds applied to the satisfaction of their debt.

Said mortgage was attached as an exhibit to the petition of intervention and contained the following provision:

> "These cattle are located on said mortgagor's range, three miles southeast of Pryor Creek, I. T. And being all the property of the

above description, owned and controlled by the mortgagor now on said premises, and this mortgage is intended to cover and include all of said property of the above description and any addition and increase thereto located on the above described premises and range, if any, thereabouts. The marks and brands used above to describe said property are the holding marks and brands and carry the title, although said property may have other marks and brands. If the mortgagor should desire to mix any other property with the above, before doing so he shall give a full description of said property intended to be so mixed, with the name of the owner thereof to said second party, and obtain the written consent of said second party before mixing the same." (Rec., p. 37.)

There was also a provision in said mortgage to the effect that the same should cover and secure the original indebtedness and any extensions thereof and all new notes taken for the purpose of renewal of said debt, or any part thereof, and this provision was also embodied in the face of the notes described by said interveners in their plea of intervention (Rec., pp. 96-97).

On August 23, 1905, the court transferred said cause from the law docket to the equity docket and permitted J. C. Hogan, Mary D. Mayes, Citizens Bank of Pryor Creek and Vinita National Bank to intervene and set up junior liens on said property, except the Vinita National Bank, which set up a prior lien to secure a small sum of money (Rec., pp. 49-56).

On August 13, 1905, the First National Bank of Vinita filed its interplea, setting up a junior mortgage lien on said property (Rec., p. 32).

On August 23, 1905, all the parties then before the court joined in a petition to the court for the appointment of a receiver (Rec., p. 58), and a receiver was duly appointed, who sold the property and returned into court $11,451.47, the proceeds thereof (Rec., p. 63). This money and the interest thereon from that date constitute the only property in controversy now before this court; and except the question of jurisdiction, the material question for this court to decide and determine is: Did interveners, C. M. Keys & Company and Stock Yards Bank, at the time this action was commenced, have a good and valid mortgage lien on said cattle to secure the payment of their debts, or did they lose their mortgage lien and their property rights by their failure to have their mortgage again recorded at Vinita when said Northern District was divided into two judicial districts by the Act of Congress, approved May 27, 1902; or did said interveners lose their lien and property rights by their failure to have said mortgage indexed at Pryor Creek after the Act of Congress, approved February 19, 1903, establishing recording districts in Indian Territory, and making Pryor Creek the place of recording instruments for the district in which said cattle were situated?

The plaintiff, who attached the cattle and stood upon his attachment lien in the trial court, and all

other interveners, who came in and set up junior liens on said cattle, did so upon the theory that interveners had lost their prior mortgage lien by not re-recording their mortgage at Vinita, and also by not having the same transferred to the index at Pryor Creek. There was no question about the amount of the defendant's indebtedness to the interveners, although defendant did claim in his answer that he had paid off said indebtedness to interveners, but there was no proof to establish said claim. There was no issue of fraud presented by the pleadings in the trial court. There was no issue of innocent purchaser or mortgagee for value without notice of the mortgage of interveners, and there was no evidence offered or introduced before the master tending to sustain any such pretended claim.

On August 23, 1905, defendant filed his answer to the petition of intervention and in effect denied their debt and claimed he had fully paid off the same, but asked the master to take proof and state the account between them, and that if it was found that he still owed interveners, that same be declared a lien upon said cattle, and that they be sold in satisfaction thereof; but if he had overpaid interveners, then that he have judgment as his rights might appear.

On October 5, 1905, in answer to defendant's said cross-complaint interveners set up and exhibited the entire account between defendant and intervener C. M. Keys & Company, showing every trans-

action between them from March 1, 1900, down to and including September 6, 1905 (Rec., pp. 69-76), and the proof sustained interveners' contention and the master recommended judgment in favor of interveners for the balance of said indebtedness, to-wit, $15,808.69 (Rec., p. 22).

On December 5, 1905, plaintiff filed its answer to the petition of interveners, declaring a want of knowledge sufficient to enable it to form a belief about the matters and things set up by interveners, and, therefore, it denied that intervenors held

> "any note or mortgage executed by Wat Mayes; and it therefore denied that the intervener herein has any lien for any sum upon the property attached in this case." (Rec., pp. 80-81.)

Plaintiff filed like answers to the petitions of intervention of the other parties.

On August 6, 1906, after the master had taken all the testimony offered by all the parties, he filed in said court his report wherein he found,

> "That subsequently to the passage and approval of the Act of Congress of May 27, 1902, it was the duty of C. M. Keys & Company and Stock Yards Bank * * * if they desired to preserve their liens as against subsequent mortgagees, or attaching creditors, to have their mortgages filed or recorded at Vinita, Indian Territory."

And also,

> "That subsequently to the passage and approval of the Act of Congress approved Febru-

ary 19, 1903, it was the duty of C. M. Keys & Company and Stock Yards Bank * * * if they desired to preserve their liens as against subsequent mortgagees and attaching creditors to have their mortgages indexed at Pryor Creek, Indian Territory."

The master in his said report recommended that the attachment lien of the plaintiff be sustained; that certain lots of land upon which the plaintiff and intervener, First National Bank of Vinita, held mortgages, be ordered sold and the proceeds arising therefrom be added to the cattle fund, and paid out in the following order:

1. To costs accrued in this case;
2. The claim of First National Bank of Vinita, which the master finds to be ..... $ 3,778.19
3. The claim of the First National Bank of Claremore, which amounts to 4,869.19
4. The claim of Citizens State Bank of Pryor Creek, which the master finds amounts to, with interest.. 1,824.68
5. The claim of J. C. Hogan, which the master finds amounts to.... 6,187.00
6. The claim of Mary D. Mayes, which the master finds amounts to, with interest..... 144.00
7. The claim of the Vinita National Bank which the master finds amounts to 729.04

8. The claim of C. M. Keys & Company and Stock Yards Bank, which the master finds amounts to $15,808.69
(Rec., p. 122.)

On September 3, 1906, interveners filed exceptions to said report (Rec., p. 123). There were no other exceptions filed to said master's report by any of the other parties to the action.

On January 7, 1907, the court overruled said exceptions and rendered a decree in accordance with the recommendation of the master in his said report. In fact, the decree contains a literal copy of the findings of the master, with the additional finding as follows, to-wit:

> "That the mortgage of C. M. Keys & Company is an absolute fraud, by reason of their failure to renew or to advise people in any way, shape or form of the various payments that had been made." (Rec., p. 135.)

The court ordered the claim of interveners paid seventh in the order of payment, which claim with interest the court found amounted to $17,245.31 (Rec., p. 137). The court also ordered the claim of the First National Bank of Vinita, amounting to $4,144.42, to be paid first, after the payment of the costs; also the claim of the plaintiff, amounting to $5,413.99, to be paid second.

On March 6, 1906, interveners duly appealed from said decree to the Court of Appeals in Indian

Territory; on November 16, 1907, Indian Territory became a part of the State of Oklahoma and this cause was transferred under the provisions of the Enabling Act to the Supreme Court of Oklahoma.

On September 10, 1908, the Supreme Court rendered an opinion in the case and upheld the mortgage of interveners and modified the decree of the lower court, so as to require the payment of all the claims in the order of their priority, the claim of the Vinita National Bank being first, and the claim of the interveners second, instead of seventh, out of the cattle fund and no other fund, and the other claims in the order of their priority.

22 Okla. 174.

A rehearing was granted and on September 14, 1909, the court handed down an additional opinion discussing and deciding some minor questions in the case, but adhering to the former opinion upholding the validity and priority of the mortgage lien of interveners. Plaintiff and the other losing parties requested the court to render judgment, but the court declined and sent the case back to the District Court of Craig County, Oklahoma, the successor to the United States Court for the Northern Judicial District of Indian Territory, at Vinita, with instructions to

> "Let the judgment of the court below be modified to conform with this opinion." (Rec., p. 180.)

22 Okla. 185.

On March 10, 1910, after the mandate had been received by said District Court, these losing parties made application to said court to file amended answers to the petition of interveners (Rec., pp. 145-163). On April 2, 1910, the court, having refused to allow amendments and re-try the case, rendered judgment in obedience to the mandate of the Supreme Court, wherein it ordered that the claim of the Vinita National Bank be paid first, and that the claim of the interveners amounting to $17,245.31 be paid second,

> "out of the funds derived from the sale of the cattle."

Thereupon these losing parties appealed to the Supreme Court of Oklahoma again, where interveners filed a motion to dismiss their petition in error on the ground, among others, that all the questions then presented by said petition in error had been judicially determined on the former appeal, and the Supreme Court sustained said motion and dismissed their appeal. (27 Okla. 704.)

The claim of the Vinita National Bank in the principal sum of $809.77, by stipulation of all the parties in the District Court of Craig County, was paid off out of the cattle fund (Rec., p. 185). Mary D. Mayes did not appeal. The proof showed that the cattle levied on by authority of the order of attachment sued out by plaintiff were the same cattle and their increase that had been mortgaged to inter-

veners, C. M. Keys & Company. The mortgages of plaintiffs in error, J. C. Hogan and Citizens Bank of Pryor Creek, were made by defendant after the commencement of this action, and the mortgage of plaintiff in error, First National Bank, of Vinita, executed by defendant January 16, 1903, contained the recitation that the "cattle above described have various mortgages on them," which included the mortgage of interveners (Rec., p. 78).

ARGUMENT

I will present my argument in support of three general propositions, to-wit:

(1) The court is without jurisdiction to review this case on writ of error.

(2) The mortgage of interveners is a good and valid mortgage, by reason of which intervener Stock Yards Bank is entitled to the funds arising from the sale of said cattle.

(3) The argument of counsel for plaintiffs in error is based upon many erroneous statements, both of fact and of law.

First

The court is without jurisdiction to review this case on writ of error.

The final decision of the Supreme Court of Oklahoma, the highest court of the state, dismissed the petition in error because every material question presented by said petition in error had been decided on the first appeal and could not be reviewed on a second appeal. This is the settled law of Oklahoma.

Okla. City Elec. etc. v. *Baumhoff*, 21 Okla. 503;

Chicago etc. Ry. Co. v. *Broe*, 23 Okla. 396;
State Bank v. *City National Bank*, 26 Okla. 801.

There was no federal question presented in the petition in error and none involved in the final decision of the Supreme Court of Oklahoma. The decision of the Supreme Court of Oklahoma on the first appeal, rendered September 14, 1909, determined all the questions presented and involved in the controversy and all the rights of the parties thereby became and were thereafter *res adjudicata* and all the parties and that court itself were bound by that judgment, and the Supreme Court of Oklahoma had no right on the second appeal to review that judgment, nor will this court do so on writ of error.

Northern Pacific Ry. Co. v. *Ellis*, 143 U. S. 498;
City of New Orleans v. *New Orleans W. W. Co.*, 142 U. S. 83;
Thompson v. *Maxwell Land Grant & R. Co.*, 168 U. S. 457.

In the case of *Northern Pacific Railway Company* v. *Ellis, supra*, Mr. Chief Justice FULLER, in delivering the opinion of this court, said:

> "The Supreme Court (of Wisconsin) held that by reason of its decision of May 20, 1890, when the case was presented to the court on the appeal of the Railway Company from the order of the lower court upon demurrer, the rights of the parties were *res adjudicata* and that it was itself, as the parties were, bound by its own former judgment. Its conclusion had been announced and its mandate had gone down and it

had no power upon a second appeal to review that judgment. This is a settled rule in Wisconsin."

This is also the settled rule in Oklahoma, as I have shown by a citation of the decisions of the Supreme Court of that state. Therefore, I respectfully submit that the decision of the Supreme Court of Oklahoma on the first appeal fully and finally determined all the questions presented in that record, and all the questions that are presented in this record, and that court had no jurisdiction to review the case upon a second appeal, and its judgment dismissing the appeal cannot be reviewed on writ of error in this court. Therefore, the motion filed herein by these interveners ought to be sustained and the writ of error dismissed.

Plaintiffs in error complain of the District Court of Craig County in refusing to allow them to amend their pleadings and in denying to them their application to set up some alleged new matter, but the action of the District Court of Craig County, in refusing to allow them to file amended pleadings, was a matter within the discretion of the court and one which will not be reviewed by this court upon writ of error.

Central Trust Co. v. *Grant Loco. Works,* 135 U. S. 200.

The decision of the Supreme Court of Oklahoma was correct, regardless of the federal question.

Hammond v. *Johnston,* 142 U. S. 78.

Second

The mortgage of interveners is a good and valid mortgage by reason of which intervener Stock Yards Bank is entitled to the funds arising from the sale of said cattle.

By an Act of Congress, approved May 2, 1890 (26 St. L. 81), Chapter 110 of Mansfield's Digest of the Laws of Arkansas was put in force in Indian Territory and governed and controlled the execution and recordation of the mortgages under which the various parties claim their liens.

Section 4742 provides:

> "All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded, if for lands in county or counties in which the lands lie, and if for personal property, in the county in which the mortgagor resides."

Section 4743 provides:

> "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the Recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

By the Act of Congress, approved March 1, 1895 (28 St. L. 693), the Indian Territory was di-

vided into three judicial districts, the Northern District consisting of all the Creek country, all the Seminole country, all the Cherokee country, and all the country occupied by the Indian tribes in the Quapaw Indian Agency, and the townsite of the Miami Townsite Company.

By the Act of Congress of May 2, 1890, the duties of the Clerk of the United States Court were defined, and among his duties, it provided:

> "They (the clerks) shall also be ex-officio recorders within their respective divisions, and as such they shall perform such duties as are required of Recorders of Deeds under the said laws of Arkansas and receive the fees and compensation therefor which are provided under the said laws of Arkansas for like services."

Under this act a recording office was kept at Muskogee in said Northern District for recording all instruments required to be recorded in the Northern Judicial District of Indian Territory.

Interveners took their mortgage from the defendant on October 29, 1901, and caused the same to be recorded on October 31, 1901, at two o'clock in the afternoon, in Book M at page 286 of the records of said ex-officio recorder at Muskogee in said Northern District (Rec., p. 40).

There is no dispute or controversy in this case but that intervener, C. M. Keys & Company, then and there acquired and fixed a good and valid mortgage lien upon the cattle therein described, their in-

crease and additions. This mortgage was given to secure an indebtedness of $34,800.04, evidenced by one certain promissory note, due in six months after date (Rec., p. 38).

By an Act of Congress, approved May 27, 1902 (32 St. L. 245), the Western Judicial District was carved out of the Northern Judicial District, and Muskogee was continued the recording town for said Western District, and Vinita was made the recording town for the new Northern Judicial District, and it was provided:

> "That the Clerk's office at Vinita shall also be the recorder's office for the Northern District, except that the Clerk's office at Miami shall continue to be the recording officer for the Quapaw Indian Agency, as now provided by law."

By an Act of Congress, approved February 19, 1903, the Indian Territory was divided into recording districts, and District Numbered 5 included within it the cattle in controversy and the town for recording instruments for said recording district was Pryor Creek.

That act made it the duty of the clerk and his deputies to file and record all instruments therein described and make and keep indexes, and it contained the following provision:

> "Such instruments heretofore recorded with the clerk of any of the United States courts in Indian Territory shall not be required to be again recorded under this provision, but shall

be transferred to the indexes without further cost, and such records heretofore made shall be of full force and effect, the same as if made under this statute."

The plaintiff commenced its action and caused an order of attachment to be levied upon said cattle upon the theory that interveners had lost their lien at the time the Northern District was divided into two districts and Vinita was made the recording town for the said Northern District on May 27, 1902; and also had lost their lien when the recording districts were established on February 19, 1903, for their failure to cause the clerk to index their mortgage at Pryor Creek, the recording district wherein the cattle were situated. The interveners contend that having taken their mortgage, and the same having been executed, acknowledged and recorded according to law, they had done all that was required of them by the law; that they had fixed a mortgage lien upon the property described in said mortgage and that the same was a vested right, which Congress could not take away from them by any legislative enactment.

Interveners further contend that said acts imposed upon them no duty with respect to having their mortgage re-recorded at Vinita, or indexed at Pryor Creek; that it did impose upon the clerks and officers of the court the duty of making up and keeping said records, and the clerk testified that the reason their records were not made and kept up in accord-

ance with said Acts of Congress was because no appropriation was made to pay for said work (Rec., p. 100). To give to said Acts of Congress the construction insisted upon by counsel for plaintiff, that immediately upon the passage of said acts it became the duty of interveners to re-record their mortgage at Vinita and to re-index it at Pryor Creek, would make said acts unconstitutional and void, in that they would deprive interveners of property without due process of law; for the court will see, by an inspection of said acts, that there was no time allowed by Congress to owners of prior recorded mortgages in which to re-record them and re-index them. The master held against the interveners and recommended to the court that

> "Subsequently to the passage and approval of the Act of Congress of May 27, 1902, it was the duty of C. M. Keys & Company and Stock Yards Bank * * * if they desired to preserve their liens as against subsequent mortgagees or attaching creditors, to have their mortgage filed for record at Vinita, Indian Territory."

And also, that,

> "Subsequently to the passage and approval of the Act of Congress approved February 19, 1903, it was the duty of C. M. Keys & Company and Stock Yards Bank * * * if they desired to preserve their liens as against subsequent mortgagees or attaching creditors, to have their mortgage indexed at Pryor Creek, Indian Territory."

The recommendations of the master were adopted by the court and a decree was entered accordingly, but this decree was modified by the Supreme Court of Oklahoma, which court upheld the mortgage of these interveners and ordered the fund derived from the sale of the cattle applied on interveners' debts in preference to other creditors holding junior liens. (22 Okla. 174.) There can be no doubt of the correctness of the decision of the Supreme Court of Oklahoma.

Interveners discharged their whole duty under the law when they placed their mortgage with the Clerk of the United States Court and ex-officio recorder at Muskogee on October 31, 1901, and what was thereafter necessary to be done to complete the record and preserve the mortgage lien in favor of the mortgagees was the duty of the clerk and ex-officio recorder.

Oats v. *Walls,* 28 Ark. 245;
Case & Co. v. *Hargadine,* 43 Ark. 148;
Melton v. *Turner,* 38 Tex. 81;
Wade on Notice, Sec. 195;
Jones on Chat. Mtg., Secs. 271-272;
Stringer v. *Lessees of Young,* 3 Pet. 320.

It is the contention of counsel for these interveners that the Oklahoma courts gave to the Acts of Congress the construction which was intended by Congress; that to give to said Acts of Congress the force and effect contended for by counsel for plaintiffs in error would render them unconstitutional

and void, because no time was given or allowed in the acts themselves to the owners and holders of mortgages theretofore properly recorded, in which the same could be transferred to the records of the new recording districts, and if no time was allowed, then the very moment the Acts of Congress became effective the property rights of these interveners would have been destroyed by legislative enactment. Time must be allowed in the act itself, and that time must be a reasonable time, in which the owners and holders of mortgages could comply with the Acts of Congress and re-record and re-index their mortgages.

It was held by this court in *Terry* v. *Anderson*, 95 U. S. 632:

> "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action before the bar takes effect. * * * In all such cases the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable."

In the case of *Walker* v. *Whitehead*, 16 Wall. 317, it was held:

> "The laws which exist at the time and place of the making of the contract, and where it is to be performed, enter into and form a part of it. These embrace alike those which effect its validity, construction, discharge and enforcement. The states may change the remedy, pro-

vided no substantial right secured by the contract is impaired. Whenever such result is produced by the act in question, to that extent it is void. Any impairment of the obligation of the contract, the decree of impairment is immaterial, is within the prohibition of the Constitution."

In *Vance* v. *Vance*, 108 U. S. 514, it was held:

(520) "And as the Supreme Court of Louisiana says, 'This is a statute of limitation, giving a reasonable time within which the holder of one of these secret liens may make it public, otherwise it will be void against subsequent purchasers and creditors without notice'."

Mr. Justice HARLAN, in rendering the opinion of this court in the case of *Wheeler* v. *Jackson*, 137 U. S. 255, says:

"It is the settled doctrine of this court that the legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which to enforce existing causes of action may be commenced, *provided*, in each case a reasonable time, taking all of the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect. *Terry* v. *Anderson*, 95 U. S.; *Koshkonong* v. *Burton*, 104 U. S.; *McGahey* v. *Virginia (in re Brown)*, 135 U. S."

Again, in the case of *Jackson* v. *Lamphir*, 3 Pet. 280, the court held:

"It is within the undoubted power of state legislatures to pass recording acts by which the elder grantee shall be postponed to a younger,

if the prior deed is not recorded within the limited time. * * * The time and manner of their operations, the exceptions to them, and the acts from which *the time* limited shall begin to run, will generally depend upon the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the urgency which leads to the enactment. *Causes may occur where the provisions of the law on those subjects may be so unreasonable as to amount to a denial of the right, and call for the interposition of the court.*"

Cooley's Constitutional Limitations, chapter XI., page 523 (7th ed.), says:

"All statutes of limitations, also, must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing right of claimants without affording this opportunity; if it should attempt to do so, it would be not a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time, must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice."

While these authorities apply to the power of the legislatures of states, which are prohibited by

the Constitution from passing any laws impairing the obligations of contracts, which Constitutional provision applies to states, and not to the United States, still "The United States cannot any more than a state interfere with p r i v a t e rights, except for legitimate governmental purposes that are not included within the Constitutional provision which prevents states from passing laws impairing the provisions of contracts, but equally with the states they are prohibited from depriving persons or corporations of property without due process of law." (Mr. Chief Justice WAITE in *Union Pacific R. R. Co.* v. *U. S.*, 99 U. S. 718.)

Therefore, these interveners say that Congress did not intend, by passing the recording acts for the Indian Territory, to impose upon them the duty of re-recording their mortgage at Vinita, and thereafter indexing the same at Pryor Creek; it intended that the same should be done by government officials who had the legal care and custody of the records of the United States Court at these different towns. To give to the Acts of Congress any other construction would be to hold them unconstitutional and void, because the moment they were passed and approved the attaching creditor could have deprived them of their property rights by attaching the cattle upon which they had theretofore held a valid and subsisting mortgage. If Congress intended that the owners and holders of mortgages in the Indian Territory should re-record their mortgages, or re-in-

dex their mortgages, then it would have fixed, in the face of the statute, a reasonable time within which they might comply with the terms of it; and inasmuch as there was no such time fixed in either of the acts referred to, it is conclusive evidence that Congress did not intend to impose upon the holders of mortgages any such onerous and unreasonable obligations.

Third

The argument of counsel for plaintiffs in error is based upon many erroneous statements, both of fact and of law.

Counsel for plaintiffs in error have devoted eighty-seven pages of their printed brief to their argument, a great deal of which is upon questions entirely immaterial to the issues before this court, and to the questions to be determined. A great deal of their argument is based upon erroneous statements, both as to facts and as to the law. It is, therefore, considered necessary to point out these erroneous statements.

On page 124 of their brief, counsel for plaintiffs in error say:

> "Under the general law and under section 5080 of Mansfield's Digest of the Statutes of Arkansas, it is the duty of the court at any stage of the proceeding to permit the amendment of the pleadings by adding other allegations."

I respectfully submit that it was not the duty of the court, but that it was within the sound discretion of the court to permit amendments. Said statute provides:

> "The court may at any time, in furtherance of justice and on such terms as may be proper, amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake, in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved."

On the same page, counsel for plaintiffs in error contend that the trial court was of the opinion that the allegation in plaintiff's reply, denying the existence of a lien was sufficient to raise the question of fraud in the mortgage, but that the Supreme Court of Oklahoma took a different view of it, and then, by inference, contend, under section 5065 of Mansfield's Digest of the Statute of Arkansas, that the court was required to liberally construe the answer to the interplea. The statute referred to does not relieve the party from pleading the facts which he claims constitute fraud. Fraud is never presumed; it must be alleged and proved.

On the same page, counsel say that the Supreme Court of Oklahoma held that the pleadings were not sufficient to put these matters in issue, whereas, the said court held that

> "There is no question of actual fraud in this case, nor is there claimed to be any."

This is correct; there was no suggestion of fraud by any of the parties in their pleadings, and no effort upon the part of any of them to give testimony of any fraud, either actual or constructive. The trial court found that

> "The mortgage of C. M. Keys & Company is an absolute fraud, by reason of their failure to renew or to advise people in any way, shape or form, of the various payments that had been made and the transfers that had been made." (Rec., p. 35.)

But there were no pleadings upon which this finding could rest, and no proof in the record even tending to establish it. In fact, the very degree in which that finding was incorporated contradicts and destroys it, for the same court found:

> "*8.* The claim of C. M. Keys & Company and Stock Yards Bank, which the court finds amounts to $17,245.31." (Rec., p. 36.)

If the plaintiff could have pleaded facts which in law constituted fraud in the trial of the case before the lower court, it was his duty to do so, and the decision of the Supreme Court of Oklahoma upon the issues formed by the pleadings is *res adjudicata* of all the questions then presented, or that might have been presented in that litigation. The cases cited by counsel in their brief, on page 125, are ir-

relevant, and do not support the contention of counsel for plaintiffs in error upon any proposition now before the court.

Counsel further state in their brief, on page 125, that the lots on which plaintiff held first mortgage were sold, and the proceeds mingled with the cattle fund and actually paid out. This is an erroneous and misleading statement. Interveners have never claimed any of the money received from the sale of the lots. Every party to this suit concedes that that fund, which is a definite and determined amount, belongs to the First National Bank of Vinita and the First National Bank of Claremore; the amount for which the cattle were sold is a definite and decided amount, to-wit, $11,451.47. It is true that the Master ordered the funds derived from the sale of the town lots to be added to the funds derived from the sale of the cattle and paid out to the plaintiffs in error, postponing the payment of interveners' claim to eighth in order of payment, and thus denying to interveners the right to receive any of the money at all, because both funds would have been exhausted long before interveners were reached. The trial court adopted the recommendations of the Master, but the Supreme Court of Oklahoma held that the claim of these interveners should be paid second in order of payment, and the District Court of Craig County, in rendering judgment on the mandate of the Supreme Court, ordered interve-

ners' claim paid second in order of payment *out of the cattle fund only.* (Rec., p. 188.)

No effort is being made upon the part of interveners to claim or collect one dollar of the money for which the lots were sold, and counsel for plaintiffs in error well understand and know that to be true. The statement that these funds have been paid out is also erroneous; the truth being that on March 16, 1907, JOSEPH A. GILL, Judge of the United States Court for the Northern District of Indian Territory, made an order which this court will find on page 190 of the record herein, to the effect

> "That appeals are being taken from the decree and that pending the appeals, the parties entitled to the money ordered to be distributed, desiring that their money should be turned over to them, and that it is right and proper that each party entitled to any portion of the money shall withdraw the same upon giving a refunding bond;
>
> It is therefore ordered that each party shall give a bond to pay into the registry of the court for the benefit of the parties entitled, the amount withdrawn, with four per cent interest per year thereon when ordered by the court so to do."

So that instead of the funds being paid out, the court permitted the plaintiffs in error to withdraw the funds and give bond to return the same, if ordered to do so. Under that order, the First National Bank of Claremore received $5,476.25 (Rec.,

p. 191), and it still has that money, and under the said order, is only required to pay four per cent interest per annum thereon. Under that order, the First National Bank of Vinita received $4,192.08 (Rec., p. 192), and it still has that money, and under said order, is only required to pay four per cent interest per annum thereon. Under that order, the Citizens Bank of Pryor Creek received $2,500.00 (Rec., p. 193), and it still has that money, and under said order is only required to pay four per cent interest per annum thereon. Under that order, J. C. Hogan received $3,500.00 (Rec., p. 194), and he still has that money, and under said order is only required to pay four per cent interest per annum thereon. This mony has not been paid out, but the court permitted the parties who are in this court as plaintiffs in error, to use the money at the *unusual* rate of interest of four per cent per annum, and I respectfully submit to the court that it is a fair deduction to be drawn from the conduct of the parties plaintiff in error, that this suit has been brought here upon writ of error largely for delay, to the end that they may use this money and pay only four per cent per annum interest thereon.

With this statement of facts, the court will understand the argument of counsel for plaintiffs in error as appears on pages 125, 126, 127 and 128 of their brief.

On page 129 of their brief, counsel for plaintiffs in error state that the Supreme Court of Oklahoma

refused to allow any discussion of the motion of these intervenors to dismiss their second appeal, though it went to the merits of the case. This statement is erroneous and misleading; what the Supreme Court actually did, was to refuse to hear counsel argue the said motion orally, but did permit them to file a response and to file a printed brief in support thereof.

Counsel for plaintiffs in error, on page 129 of their brief, state that it was the opinion of the Supreme Court of Oklahoma that the law of recording chattel mortgages and the law of recording instruments affecting real estate is the same, and based upon the same principles. This is undoubtedly a true statement of the law, as will appear from an examination of section 4742 and section 4743 of Mansfield's Digest of the Statutes of Arkansas, quoted herein.

Counsel for plaintiffs in error further state that the Supreme Court of Oklahoma was of the opinion that a chattel mortgage once recorded, would remain of record for all time, and would afford constructive notice of its existence indefinitely, regardless of the changes in the law.

This statement is misleading; no such opinion was expressed by said court and counsel for interveners never made a contention for any such doctrine. It was only insisted by interveners that the mortgage was a legal instrument, was a contract which, in law, they had the right to make, and when

once acknowledged and recorded as required by law, remained in force until all the indetedness secured thereby had been paid off and discharged. Interveners are still of the opinion that this is the law.

On pages 130 and 131 of their brief, counsel for plaintiffs in error state that, on the rehearing, the Supreme Court was of the opinion that the parties could not attack the validity of the acknowledgment of the chattel mortgage, because no question was raised to it at the trial of this cause in the court below, and because the instrument relied upon was introduced in evidence would by no means establish its validity. This statement is partly true, and partly erroneous. The court will see by an inspection of the record, on pages 180 and 181, that the Supreme Court of Oklahoma observed that said mortgage had been introduced in evidence without objection on the part of anyone, and the Master had made his findings and held that the acknowledgment was sufficient, and that the trial court did not notice the question in any way, and that the objection raised against said mortgage was raised by counsel for plaintiffs in error first on appeal before that court, notwithstanding which the Supreme Court did decide and hold that, although the words *set forth* had been omitted from the certificate of acknowledgment, still the word *mentioned* contained in said certificate was equivalent, and, in the opinion of the court, sufficient to make the acknowledgment conform to the law.

On page 135 of their brief, counsel for plaintiffs in error say that this record is silent as to the knowledge of the First National Bank of Vinita as to the C. M. Keys & Company mortgage, either at the time of obtaining its note from Wat Mayes, or obtaining its mortgage. The record in this case, contradicts this statement. The mortgage under which said plaintiff in error, First National Bank of Vinita, claims the right to participate in the distribution of the fund arising from the sale of these cattle, appears on pages 77 and 78 of the record herein, and contains the following provision:

> "But this mortgage covers all the cattle, no matter where located; cattle above described have various mortgages on them, but the exact amount of the mortgages on the respective classes of cattle is unknown to the parties hereto, and it may be that all the cattle are not covered by mortgage, but the mortgagor does not represent that any of the cattle are free from mortgage."

Inasmuch as the record shows that, at the time this mortgage was made by defendant to the First National Bank of Vinita on January 16, 1903, there were but two mortgages upon the cattle of defendant, namely, the mortgage of the Vinita National Bank and the mortgage of the intervenor, C. M. Keys & Company, the term of *various mortgages* must have been intended to mean and to be the two mortgages which the record shows were then resting upon the cattle in controversy. Therefore, the rec-

ord is not silent upon the knowledge of the said plaintiff in error, but, on the contrary, his mortgage was taken subject to the mortgage of these interveners, so that all that has been said by counsel for plaintiffs in error in their brief on pages 135 to 137, is based upon false premises, and is absolutely immaterial and misleading in this case.

In the first place, counsel for plaintiffs in error did not, in the trial court, by evidence or any suggestion, claim that their clients were innocent mortgagees for value and without notice of the mortgage and claims of these interveners; that was not an issue in the case, and is raised here now for the first time, and I respectfully submit that this court will not notice the contention upon the part of counsel.

Interveners did not take possession of the mortgaged cattle, because their debt was evidenced by promissory notes, not due at the time plaintiff caused its order of attachment to be levied upon the cattle, and all these statements of counsel to the effect that the mortgage was long past due, are misleading and erroneous.

On page 143 of their brief, counsel for plaintiffs in error say that when a mortgage is one year past due, there is a presumption that some settlement has been had between the mortgagee and the mortgagor; but when it is three years past due, the presumption practically becomes a presumption of

law as between the mortgagee and strangers. No authorities have been cited by counsel for plaintiffs in error to support this extraordinary proposition. In the first place, it is not true that the mortgage was three years past due. The indebtedness which it secured was not due, and there was a provision in the mortgage by which it existed as a legal security until all the indebtedness evidenced by renewal notes had been paid off by the defendant, and, in the next place, it could only be barred by the Statute of Limitation, which, under the jurisdiction at that time on sealed instruments, was ten years. Section 4484 of Mansfield's Digest of the Statutes of Arkansas, then in force in Indian Territory, provides:

> "Actions on writings under seal shall be commenced within ten years after the cause of action shall accrue, and not afterwards."
>
> *Andrews* v. *Sims,* 33 Ark. 771.

In their brief, on page 144, counsel for plaintiffs in error say that it was the idea of the Supreme Court of Oklahoma, that the clerk of the United States Court was responsible for the Keys mortgage not being of record at Vinita and indexed at Pryor Creek. What difference did it make? How have plaintiffs in error been injured, when each and all of them have stipulated that they knew of the existence of the mortgage of these interveners and the condition of the records at Muskogee (Rec., pp. 112-113), at the time of the attachment, and prior

thereto, except Mary D. Mayes, who is not a party to this action now?

Therefore, it makes no difference whether it was the duty of the clerk of the court or the duty of the interveners to re-record their mortgage at Vinita and index it at Pryor Creek. The purpose of recording instruments is to give constructive notice, and such notice is not necessary to junior lien holders and attaching creditors when they have actual knowledge of the rights of these interveners.

Counsel for plaintiffs in error, beginning on page 146 of their brief, criticise the authorities upon which the Supreme Court of Oklahoma based its decision, but they do not cite any authority sustaining the unusual and extraordinary position they have taken with reference to interveners' mortgage. Not one case has been cited by counsel for plaintiffs in error where any court has ever held in a case similar to the one now before the court, that the owner and holder of a mortgage loses his lien when a county or district in which the same has been properly recorded is thereafter divided, and I dare say that there is no such decision by any of the courts.

Counsel for plaintiffs in error, on page 157 of their brief, say that it was the duty of the holder of the mortgage to first request the clerk to record their mortgage, and, second, to put it in his power to record the same, and third, to tender him the fees for so doing. That is true of the statute as contained in

Mansfield's Digest, but it is not true of the Act of Congress approved February 19, 1903, which act was a modification of the requirements of the Statutes of Arkansas, providing that these mortgages should be transferred to the index at Prior Creek without further cost, which means without any cost to the owner and holder of said securities.

The case of *Bank* v. *Martin*, 23 Pac. 920, cited by counsel for plaintiffs in error on page 165 of their brief, is not in point, and does not sustain the contention of plaintiffs in error. In that case, the owner of a drug store gave a mortgage to secure a certain indebtedness, and remained in possession of the drug store and fixtures, and continued to sell goods at retail, and of course the court held that the mortgage was invalid as against attaching creditors. That is the universal law made necessary for the protection of honest mercantile businesses.

On page 167 of their brief, counsel for plaintiffs in error say that the mortgagee's duty is a continuing one, either to take possession of the property or to record their mortgage where the property is located. This is exactly what the interveners did; their mortgage was immediately recorded, after the same had been executed and acknowledged, in the proper recording district, and by that act all the people of the entire Northern District of Indian Territory immediately became charged with constructive notice of the mortgage and its contents, including the provision for renewal notes and their in-

crease of cattle, and that notice continued from that time forth, regardless of the number of recording districts that were thereafter created by Congress.

Counsel for plaintiffs in error, at the bottom of page 167 of their brief, ask this peculiar question:

> "Is not the mortgagor's security by operation of law as against creditors, independent of the registration law, invalid, unaccompanied by possession?"

I must confess that this is a new proposition of law, and yet counsel say that the law books practically so hold from the time of *Twyne's* case to the present time. The authorities cited in support of that proposition by counsel on page 168, do not sustain any such proposition.

The statements made by counsel on page 169 of their brief are not true, but are misleading, and have the tendency to confuse, rather than to assist, the court in understanding the truth as it appears in the record in this case.

On page 170 of their brief, counsel for plaintiffs in error say that where the maturity of the note described in said mortgage as becoming due in one month, and the note provided that it would become due in six months after date, the same cannot be introduced in evidence until the mortgage is reformed in equity, but interveners alleged in their petition the truth in regard to the maturity of said note, and

introduced said note in support of that allegation without objection upon the part of counsel for plaintiffs in error, and I respectfully submit that it is too late now to complain of that action. So that all that is said by counsel on pages 170, 171, 172, 173 and 174 of their brief about the requirement of reformation of mortgages is irrelevant and immaterial.

On page 175 of their brief, counsel for plaintiffs in error say:

> "It seems, therefore, that on its face (interveners' mortgage), has more the ear-marks of an assignment to raise a fund to pay a debt than of a mortgage."

Granting, for the sake of argument, that said instrument is an assignment of the property described therein to raise funds to pay off an indebtedness, by what rule of law has plaintiffs the right to take it away from the assignor, or the assignees, and appropriate the same to the payment of its debt?

Sections 4759 and 4760 and 4761 of Mansfield's Digest of the Statutes of Arkansas, quoted by counsel for plaintiffs in error on pages 175 and 176, are immaterial, and do not tend to support any issue in this case.

On page 177 of their brief, counsel for plaintiffs in error say that said mortgage, on its face, violates the law on the subject of sale and satisfaction, because it provides for a method different from that prescribed by law. The only trouble with this statement is, it is not true.

Counsel also contend on the same page of their brief, that interveners are not entitled to the increase of the cattle, although the mortgage provides that they shall have a mortgage upon the increase, and cite a number of cases on page 178 to sustain their proposition, and, to sustain the further proposition that a mortgage given for property not in existence is void; but that was not the law of this jurisdiction at the time the mortgage of C. M. Keys & Company was made, and was not the law at the time this suit was commenced by plaintiff, and is not the law of this case now.

Jones on Chattel Mortgages, section 149, states the rule as follows:

> "Under the rule that the incident follows the property, a mortgage of domestic animals covers the increase of such animals, though it is silent as to such increase, and it is not insumbent upon the mortgagee to take and hold the property as against the purchaser of such increase." * * * "If the mortgage in terms covers the increase as between the parties, it remains a lien upon such increase until the debt is paid or the mortgage discharged, as any other mortgage may be discharged; but as to subsequent purchasers, the mortgage lien does not continue after the period of suitable nurture has passed, unless the purchaser has given actual or constructive notice that the young animals are in fact those referred to in the mortgage. If the increase are not mentioned in the mortgage, after the young have entirely separated from the mother, subsequent purchasers would have nothing to put them upon inquiry as to the ex-

istence of any lien upon the young, and would not be bound except upon receiving actual notice."

A bona fide mortgage to secure the payment of future advances is good.

Brewster v. *Clamfit*, 33 Ark. 72.

A mortgage to secure indefinite future advances is valid as against third parties.

Jarratt v. *McDaniel*, 32 Ark. 598;

Northwestern National Bank v. *Freeman*, 171 U. S. 620.

On page 179 of their brief, counsel for plaintiffs in error inquire:

"But waiving everything else, did not C. M. Keys & Company show by their own pleading that the debt secured had been actually paid as against other lien holders?"

The Master, in his report, answered this inquiry by finding that their debt had not been paid off, but that defendant, Wat Mayes, owed interveners the sum of $15,808.69 (Rec., p. 122). If this finding of the Master was not correct, counsel for plaintiffs in error ought to have filed their exceptions to the same and properly appealed from the decree incorporating said finding therein. Having failed to do so, I respectfully submit that they cannot now be heard to complain.

On page 180 of their brief, counsel for plaintiffs in error quote the answer by defendant, but fail

to tell the court that there was not one word of testimony offered to support the allegations of said answer, but, on the contrary, the proof showed, and the Master found, and the court adjudged, that the defendant had not paid off the debt of interveners, and the court rendered judgment accordingly, and no exception was saved by any of the parties to the action of the court. It is raised here, so far as this record discloses, for the first time; and so all the decisions that counsel have cited on pages 181, 182, 183 and 184 are, for the reasons heretofore stated, irrelevant and immaterial.

On page 185 of their brief, counsel for plaintiffs in error say:

> "It is contended by the writer that C. M. Keys & Company's mortgage, if of record, was void, by reason of the fact that the record was misleading, in that it was not true that such a mortgage existed as the Muskogee record shows, by reason of the fact that as against creditors, the mortgage was dead by virtue of limitation and by reason of the fact that Keys & Company had actually participated in allowing Mayes to use the mortgaged property in such way as to destroy the mortgage."

By an inspection of the mortgage of interveners, on page 37, and the mortgage of Vinita National Bank, on page 43, it will be seen that the marks and brands are the same, and by an inspection of the testimony of the defendant, on page 98 of the record, it appears that a great number of the young cattle

belonging to the three brands, "W," "C" and *slash* on thigh, were the increase of the original cattle described in the mortgage. There was no contention in the trial court that the cattle attached by the plaintiff were any other cattle than those described in the mortgage of interveners, and claimed by them, and it is heard now for the first time upon appeal.

Counsel for plaintiffs in error quote the opinion of the Supreme Court of Arkansas in the case of *Sullivan* v. *Hadley*, 16 Ark. 148, on pages 186 and 187 of their brief, but this decision has been expressly overruled in a subsequent decision of that court.

Whittington v. *Flint*, 43 Ark. 504.

On pages 187, 188 and 189, counsel for plaintiffs in error contend that the mortgage of interveners was past due, and that the only way interveners could preserve their lien was by taking possession of the cattle. These statements are not true, and are misleading, because the indebtedness secured by said mortgage was not due at the time plaintiff caused the order of attachment to be levied upon the cattle.

The case of *Bank* v. *Kissare*, 98 Pac. 432, cited by counsel for plaintiffs in error on page 190 of their brief, is not in point.

On page 191 of their brief, counsel say that interveners ought to be estopped; that they are guilty of negligence and actual fraud, as claimed by Mayes

in his cross-complaint and admitted in effect by Keys & Company. The worst trouble about this statement, is that it is not true. The fact is, that before counsel could invoke the doctrine of equitable estoppel, he would be required to specially plead the same, and make it an issue in the trial court; he cannot raise it for the first time in this court.

The case of *Gauss & Sons* v. *Doyle & Co.*, 46 Ark. 125, cited by counsel on page 192 of their brief, is not in point, but has relation to a mortgage on a stock of merchandise, being sold in due course of retail trade; and so, also, with the cases cited by counsel on pages 193, 194, 195, 196, 197, 198, 199, 200 and 201 of their brief.

On page 202 of their brief counsel again complain that the certificate of acknowledgment to the mortgage of interveners was fatally defective, in that the words *set forth* were left out. In ordinary form is *mentioned and set forth*, and the words *set forth* were left out, but again, it is necessary to remind counsel of the fact that no objection was made to this mortgage on this account, and it was introduced at the hearing before the Master by counsel for interveners, without objection upon the part of anyone.

On page 205 of their brief, counsel say that limitation would have run against the claim of the mortgagee in favor of the mortgagor if the possession had been adverse, but this is not true, as hereinbefore pointed out.

The authorities cited on page 207 are not in point. Counsel for plaintiffs in error, on page 207, say that C. M. Keys & Company are in the attitude of standing upon the proposition that Congress could not require them to pay a few cents to give notice to other parties, and relied upon the proposition that a mortgage theretofore recorded should not be required to be recorded again, that they might escape the costs thereof altogether. Interveners do not stand upon any such proposition, but take the position that Congress did not intend that they should perform any part of the work of the clerks and ex-officio recorders of the United States Courts for the Indian Territory.

CONCLUSION

I therefore respectfully submit to the court that there are but two questions necessary for the decision of this court raised in this record:

First. Has the court jurisdiction to review this case upon writ of error?

Second. Did interveners lose their lien by their failure to cause their mortgage to be re-recorded at Vinita and to cause their mortgage to be re-indexed at Pryor Creek? If they did not, then they would be entitled to the funds arising from the sale of the cattle.

Respectfully submitted,

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